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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

AT THE

SEPTEMBER TERM, A. D. 1917

AND

THE TERMS OF JANUARY AND APRIL 1918

E. T. WELLS, REPORTER

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JUSTICES OF THE COURT DURING THE TIME OF THESE REPORTS

HOL S. HARRISON WHITE, *Chief Justice.*
During the September Term, A. D. 1917.

HON. WILLIAM H. HILL, *Chief Justice.*
During the Terms of January and April, A. D. 1918.

Justices—

HON. JAMES E. GARRIGUES
HON. TULLY SCOTT
HON. JAMES H. TELLER
HON. MORTON S. BAILEY
HON. GEORGE W. ALLEN

JUDGES OF THE DISTRICT COURT AT THE PUBLICATION OF THESE REPORTS

Samuel W. Johnson—First District.....Wheatridge
Charles C. Butler—Second District.....Denver
Henry J. Hersey—Second District.....Denver
Julian H. Moore—Second District.....Denver
Clarence J. Morley—Second District .....Denver
Greeley W. Whitford—Second District .....Denver
A. F. Hollenbeck—Third District .....Trinidad
A. C. McChesney—Third District.....Trinidad
Arthur Cornforth—Fourth District .....Colorado Springs
J. W. Sheafor—Fourth District .....Colorado Springs
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Thomas J. Black—Seventh District.....Montrose
George H. Bradfield—Eighth District.....Greeley
Neil F. Graham—Eighth District.....Ft. Collins
John T. Shumate—Ninth District.....Glenwood Springs
J. H. H. Low—Tenth District.....Pueblo
James A. Park—Tenth District.....Pueblo
James L. Cooper—Eleventh District.....Canon City
Jesse C. Wiley—Twelfth District.....Del Norte
Louis C. Stephenson—Thirteenth District.....Ft. Morgan

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Cases Argued and Determined

In

The Supreme Court of the State of Colorado

At September Term, A. D. 1917

No. 8904.

CONE *v.* CARLTON.

1. PLEDGE OF COLLATERALS—*Right of Assignee.* Collaterals were pledged to secure a promissory note. The note expressly provided that any assignee thereof might take the collateral, "and should be vested with all the powers of the payee." Power was expressly given to the payee to sell the collateral, and himself buy it in. The assignee of the note was, by the assignment, vested with the same power.
2. *Sale—By Agent—Sacrifice of Collateral.* Sale of collateral may be made by an agent, acting in the name of his principal. Where the sale is in all respects regular the value of the collateral will not be investigated in an action to recover a balance due on the note.

Error to Fremont District Court, Hon. Charles A. Wilkin, Judge.

Department.

Mr. A. L. TAYLOR, for plaintiff in error.

Mr. D. W. ROSS, for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error had judgment in an action to recover on a promissory note given by the plaintiff in error to a bank, and assigned by the bank to the defendant in error. The note was secured by the deposit with the bank of certain bonds as collateral. It was not paid at maturity, and sometime later the bonds were advertised for sale, and sold, and the proceeds of such sale credited on the note. The court directed a verdict for the balance due.

The defense was directed wholly to an attack on the validity of the sale of the bonds, on the ground that the assignee did not take, with the collateral, a right to sell it; that, in any event, he could not sell it by an agent or attorney, and that the sale was void because made for only a fraction of the bonds' value. Error is assigned on an order sustaining a demurrer to an amended answer, but is not argued. This assignment involves only the questions which are argued under other assignments, and their determination will determine this also. The principal ground urged for reversal is that the payee of the note could not transfer with it the authority to sell the collateral. Several cases are cited to the point that "a discretionary power of sale cannot be delegated to a stranger by assignment." In this case, however, that rule does not apply, since the note in express terms provided that an assignee of it might take the collateral, and should 'thereupon become vested with all the rights and powers above given to said bank in respect thereto." The power was given to the bank to sell the collateral and to buy it in, and the assignee received the same power. The mere act of selling could be performed through an agent, it and all the preliminaries being performed in the name of the assignee. An agent of the plaintiff in error was present at the sale, and made no objection to it. There is nothing in the record that sug-

gests fraud in the sale, which appears to have been advertised and conducted in full compliance with the provisions of the note. There was no dispute as to the facts and the court did not err in directing a verdict.

The sale being found regular, it was not error to reject evidence of the value of the bonds.

The judgment is affirmed.

Judgment affirmed.

Mr. Justice Hill and Mr. Justice Scott concur.

No. 8681.

KORF, ET AL. *v.* ITTEN.

1. HIGHWAYS—*Establishment—Burden of Proof.* One claiming as a public highway lands in private possession by one claiming title, has the burden of proving the lawful establishment of the highway.
2. *Abandonment—Burden of Proof.* One asserting abandonment of a highway, the establishment of which is admitted or proved, has the burden of showing such abandonment.
3. PUBLIC LANDS—*Homestead—Right of Entryman.* Rev. Stat. sec. 5834 authorizes the County Commissioners to declare any section or township line in the public domain a public highway. Sec. 2477 of the Revised Statutes of the United States (U. S. Comp. St. 1916, sec. 4919) grants a right of way for the construction of highways over any public land not reserved for public use. One who enters land under the homestead act acquires an inchoate title which has the effect to except such lands from the provisions of the statutes. A highway is not to be established under the statutes cited over land so claimed.
4. ABANDONMENT OF HOMESTEAD—*Effect.* The declarations of a highway by the Board of County Commissioners over public lands claimed as a homestead, is without effect, though the entry was subsequently abandoned. The rights of the public in the supposed highway are tested by the conditions existing at the time of the attempted establishment.
5. *Rights and Remedies of Landowner.* A landowner in possession is not under duty to bring a direct action to vacate a defective proceeding to establish a road over his lands. He may rely upon his possession until his right is assailed.

6. APPEAL AND ERROR—*Wrong Reason for Right Judgment.* Where the court below reached a correct conclusion the judgment will not be reversed, though based on erroneous reasoning.
7. *Findings on Conflicting Evidence,* will not be disturbed.
8. HIGHWAYS—*By Prescription.* Action to enjoin a road overseer from opening an alleged public highway. Evidence held insufficient to establish a highway by prescription.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Messrs. MCCONLEY & MCCONLEY, for plaintiffs in error.

Mr. J. A. FOWLER, for defendant in error.

Mr. Justice Hill delivered the opinion of the court.

THE main purpose of this action was to enjoin the defendant in error, a road overseer of Yuma County, from tearing down a portion of certain fences belonging to the plaintiffs in error, for the purpose of opening certain alleged public highways, a portion of which, if opened, will be upon twenty quarter sections of land, admitted to be owned by the plaintiffs in error, unless title to the portion in controversy had become vested in the county for road purposes. The court found that the lands in dispute were public highways and gave judgment accordingly.

The lands in question being under fence, with the plaintiffs in possession claiming title thereto, the burden of proof was upon the defendant to show the existence of the highway, which was put in issue. When this is established, the burden (which was made an issue) is upon the landowner to show that the highways had been abandoned. *Dingwall v. Weld County,* 19 Colo. 415, 36 Pac. 148.

The defendant claims First, that these roads were established by the board of county commissioners of Weld County in 1886, when these lands were a part of that county, and that in case its proceedings are insufficient to sustain this contention, that all parties have acquiesced therein for about twenty-six years, and that after this long period the plaintiffs should be estopped from claiming otherwise; also that these facts are sufficient to establish highways by prescription. To sustain the first claim, he

relied upon the record of the board of county commissioners of Weld County. It discloses that upon October the 12th, 1886, a petition was presented to it, signed by about forty alleged landowners. This petition prays, that a county road or roads be laid out as follows: "Commencing at S. W. corner of Township, I N. R. 48 W., on the base line and on each section line east through ranges 48 and 47 west and to turn north to Township 5 N. R. 48 and 47 W. Also to commence at the same point and on each section line North on R. Line between 48 and 49 W. to Township 5 N. R. 48 W. and run east through ranges 48 and 47 W. Said roads to run on said section and range lines or as near as practicable. * * * Said road to be not less than sixty (60) feet in width;" that upon October 23rd, following the filing of this petition, a purported order of the board signed by its chairman was entered thereon as follows:

"Presented to the Board of County Commissioners Oct. 23rd, 1886, when the following action was taken and entered of record, to-wit: It appearing to the Board that the right of way is all granted for said roads except through unpatented Government land which is taken in accordance with Sec. 2477 of the revised statute of the U. S., and the Board believing that public good requires said road, on motion it was ordered that the prayer of the petitioners be granted and the roads herein described be and are hereby declared public highways. The Clerk is directed to record the petition, plat the roads, and notify the road overseer of the proper district to open said roads to travel at once;" that the petition and order endorsed thereon were duly filed and recorded in the office of the Clerk and Recorder in Weld County, on November 3rd, 1886; that on said 23rd day of October, 1886, a similar order or copy of this order was, by the clerk, entered in the records of said Board of County Commissioners.

It will be observed that the road or roads prayed for in this petition include all section lines in eight townships, a distance of about six hundred and forty-eight miles. The

petition discloses that practically all the petitioners who signed it as purported freeholders, reside in one township, and that no ten of them lived within two miles of any portion of the section lines covered by the alleged roads surrounding the greater portion of the lands in controversy, for which reason it is claimed the record shows affirmatively that the board was without jurisdiction to act as it did, hence its efforts were void. It is also claimed that no survey was made, no viewers appointed, no notices posted, and no compensation given, for which reasons no road was established. These contentions may be eliminated by calling attention to the fact that the petition was not presented for action under the provisions of the statute which counsel refers to, but to the contrary, was an effort under general section 5850, Revised Statutes, 1908, which authorizes the establishment of a road where all of the right of way is given, in which case the appointment of appraisers, the posting of notices, etc., is not required. As to government land, this record discloses that the board's action was attempted by authority of the latter portion of section 5834, Revised Statutes, 1908, which is to the effect that the commissioners may, at any regular meeting, by an order of the board, declare any section or township line on the public domain a public highway, and that on and after the date of such order (which shall be attested by the clerk under the seal of the county and recorded in the office of the recorder of deeds), the road so laid out shall be a public highway. This procedure as to government land not filed upon is authorized by section 2477, Revised Statutes of the United States. In such circumstances, it is unnecessary to determine whether this petition sought to establish many roads, as claimed, instead of one, or whether the petitioners resided within two miles of those in controversy, if each section line is to be considered as a separate road for the purposes of compliance with the statutes.

The plaintiffs in error own about twenty quarter sections of land through which these roads are alleged to exist. Nine

of these quarters had homestead or preemption filings upon them when, on October 23, 1886, the Weld County board made its order declaring a part thereof as public highways by virtue of it being public land. Thereafter, eight of these filings were relinquished, which lands were entered by others, several years after the board's order calling for this road. These last entries ultimately ripened into title. Patent was issued for one quarter upon the original filing, which was in existence when the board made its order declaring a public highway thereon. None of the original entrymen signed the petition for the roads. For these reasons, it is urged that the board's order declaring these section lines public highways, did not affect the lands upon which filings were in existence where the petition had not been signed by these entrymen, regardless of the fact that eight of these entries were thereafter relinquished to the government and subsequently filed on by others who procured title. The question for determination concerning these eight quarters is, were they at the time of the board's order a part of the public domain within the meaning of Section 2477, Revised Statutes of the United States. It reads: "The right of way for the construction of highways over public lands not reserved for public uses is hereby granted." Section 5834 of our Revised Statutes, 1908, provides that the board of county commissioners may, at any regular meeting, etc., declare any section or township line on the public domain a public highway.

In *Stofferan v. Okanogan County*, 76 Wash. 265, 136 Pac. 484, it was held that Section 2477, Revised Statutes of the United States did not operate as a grant *in praesenti* that the grant thereunder did not take effect until the highway was established, under some public law. In holding that a homestead entryman's right was superior to that of the county for road purposes attempted to be established subsequent to the entry but prior to the patent, the court said:

"But a homesteader, after entry, occupies an entirely different position. He has in fact purchased. His entry, which is made by making and filing an affidavit and paying

the sum required by law, is a contract of purchase which gives him an inchoate title to the land, which is property. This is a substantial and vested right which can only be defeated by his failure to perform the conditions annexed."

By analogy, this phase of this question has been determined by this court in *D. & R. G. R. R. Co. v. Wilson*, 28 Colo. 6, 62 Pac. 843, in which it was held that the act of Congress of March 3, 1875 was not in the nature of an absolute grant *in praesenti*, but was an offer to all railroad companies to have a right of way over the public lands of the United States, that is that they might accept it if they wished. This act granting a right of way to railroads is quite similar to the one concerning public highways. In holding that it did not give to the railroads a right of way over lands held by a preemptor, not located prior to his preemption filing, the court said:

"It necessarily follows from this ruling that under this act a right of way is not in the nature of a grant *in praesenti*. Indeed, it was expressly decided that a settler, who had only an inchoate right, in actual occupancy (as plaintiff here unquestionably was) must be compensated if the line of road is built across his claim. The supreme courts of several of the states have come to the same conclusion."

In *Yakima County v. Tullar*, 3 Wash. T. 398, 17 Pac. 885, in passing upon a quite similar question, the court said:

"The right of way over 'public lands' that is granted to the public for roads, etc., doubtless contemplates strictly public lands, such as are open to entry and settlement, and not those in which the rights of the public have passed, and which have become subject to some individual right of settler, or the like, as in this case. Under the laws of the United States, appellee was in possession, and such possession was good as against the world so long as he complied with the laws. From all that appears, he had possession in this way, and to say that valuable features of the land as springs, and the land itself, can thus be taken without compensation to the honest settler, for the use of the public,

is to say a self-evident wrong. * * * The public have chosen to exercise their right of locating this road. They have the benefit. Let them pay the damage."

The same reasoning in these cases leads to the conclusion that the act of Congress under consideration did not make of these section lines public highways. The act does not refer to section or township lines, but to the right of way for the construction of highways over public lands not reserved for public uses. It was a privilege which might be exercised or not. This fact was recognized by our legislature in the adoption of section 5834, *supra*, giving to the boards of county commissioners the right to declare section and township lines on the public domain, public highways, but until they did so, no highways existed, and when they attempt to do so their rights must be tested by conditions existing at that time, which, according to the decisions quoted from, is subject to the rights of the entryman.

The fact that these entries were thereafter relinquished, did not change this condition so as to make these lands public highways at the time of relinquishments. By an act of Congress of July 2, 1864, The Northern Pacific Railroad Company was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of its railroad lines through certain territory, as it may adopt, etc., free from preemption or other claim at the time the line of said road is definitely fixed and a plat thereof filed, etc. In *Bardon v. Northern Pacific Railroad Co.*, 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. 856, the court held that lands, upon which filings were in existence at the time of the passing of this act, were segregated from the public lands and did not, by the cancellation of the preemption right before the location of the grant, pass to the company, but remained a part of the public domain. In commenting at page 538, the court said:

"The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such lands as is open to sale or other disposition under general laws.

All land, to which any claims or rights of others have attached, do not fall within the designation of public land."

Per the reasoning in this case, it follows that for the purposes of the establishment of this road, these quarters were not at that time a part of the public domain; such being the case, no road was at that time established over them. The fact that they thereafter became a part of the public domain, according to the holding in the case last cited, did not change the result. The right acquired by virtue of the petition and order of the board must be tested by conditions as they existed when such action was taken, for these reasons we are of opinion that the county did not acquire the right of way for a road over any of the lands in controversy upon which valid filings were in existence, when the board attempted to act, without the signature of the entrymen to the petition.

It is admitted that the entry in existence on one of these quarters in 1886 ripened into title. The only claim to a road on it, which counsel do not make clear, is by prescription or acquiescence of the owner in the regularity of the proceedings, with a claim left the owner for damages, if any, for the right of way. They also claim that under no circumstances is he entitled to injunctive relief. We cannot agree with any of these contentions. Eliminating the question of prescription, which will be considered later, the statute prescribed the methods whereby highways can be established. If, in this respect, former efforts have not accomplished what was desired, those interested have the right to again institute proceedings in the method provided by law, but until this is done, they are not possessed with power to compel the owner to recognize the county's right to possession. When in possession the owner is not obliged to bring a direct action to set aside such proceedings, but may wait until his right to possession is attacked, before raising the question of validity, otherwise than to remain in possession under claim of title. *White et al. v. Town of Arvada,* 60 Colo. 343, 153 Pac. 696; *Munson v. Marks,* 52 Colo. 553, 124 Pac. 187.

The record discloses, that at the time and after the entry of this order of the board of county commissioners practically all the lands in controversy, including all others in that vicinity, were unfenced and the greater portion unoccupied; that people traveled over them in all directions following section lines where it suited their convenience and otherwise at their pleasure. There is nothing to show that there was any attempt of the county or any road overseer to, at that time, open any roads or do work upon them or otherwise. The record further discloses that this condition thus remained for about fourteen years; that thereafter the lands in controversy were enclosed by fences by the plaintiffs in error; that at most all of the section lines gates were put in for the convenience of the owners and who, with the public (which in that vicinity was not very large), was allowed to use them as a mode of ingress and egress through and over these lands. It is admitted that for many years plaintiffs paid taxes on the strips of land in controversy as a part of each entire quarter and that all of these last conditions continued for a period of about twelve years and up to the time that the road overseer made the threats to tear down the fences and open up the alleged roads, which brought about this litigation. Other testimony in support of the claim for public highways is that these section lines showed evidence of having been traveled, although some of them with but slight traces, while others would be traveled more if the fences were not there, and that at one time upon one of the section lines involved, that the road overseer in one of these fields or pastures, devoted one day's time with three men working thereon, in order to make it more fit for travel. The rule is, that if the judgment of the trial court can be sustained for any reason, it should be, although the one on which it is based is erroneous. We are not convinced that the judgment was upon the theory that roads had been established over the lands in controversy by acquiescence or prescription, if so, we think the testimony insufficient to support it. While the record does not state, we are of opinion that the judgment was upon the theory that the pro-

ceedings before the Board of County Commissioners were sufficient to establish the roads, which we conclude is not tenable in so far as nine quarters of this land is concerned. Per former rulings of this court, the evidence is entirely insufficient to sustain the claim of a road by prescription. *Lieber v. The People,* 33 Colo. 493, 81 Pac. 270; *Starr v. The People, etc.,* 17 Colo. 458, 30 Pac. 64.

It was stipulated that the testimony should only apply to that portion of the alleged highways affecting the alleged rights of the plaintiffs. The trial court held that roads had been established. We affirm this ruling as to any of these lands in controversy, which were not filed upon when the board declared these section lines public highways. The burden was upon the plaintiffs to show that they had been abandoned; the judgment necessarily includes the holding that they had not; the testimony is conflicting concerning it, but does disclose that the remaining strips in controversy had been used for road purposes, for which reasons we are not at liberty to reverse the ruling in this respect.

The judgment will be reversed and the cause remanded for further proceedings, as the parties may be advised, not inconsistent with the views herein expressed.

Reversed.

Decision *en banc.*

No. 8888.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* PEPPARD.

EVIDENCE—*Admissions—Offer of Settlement.* An offer to pay a sum named in settlement of a claim asserted by the one to whom the offer is made is not an acknowledgment of liability.

Error to Phillips County Court, Hon. S. S. Worley, Judge.

Mr. E. E. WHITTED, Mr. T. M. STUART, JR., and Mr. THOMAS WOODROW, for plaintiff in error.

Mr. W. D. KELSEY, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

THE amount and nature of the debt sued for, as shown by the record book kept for that purpose by the justice of the peace in whose court the action was originally commenced, is $65.00 damages for the killing of a cow by a train of the railroad company.

On the trial plaintiff was permitted over the objection of defendant, to testify that just prior to bringing the suit, he was approached by the company's claim agent, who offered to pay him $27.00 or $27.50 in settlement for the animal killed, to the admission of which testimony an exception was reserved and error is assigned thereon.

This evidence was admitted for the purpose of showing an acknowledgment of the company's liability, and in *C. B. & Q. R. Co. v. Roberts*, 26 Colo. 329, 57 Pac. 1076, such evidence is held to be an offer to compromise and incompetent. On the authority of that case the judgment must be reversed.

Reversed and Remanded.

Decision en banc.

No. 8747.

FARNCOMB ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

CONSTITUTIONAL LAW—*Due Process of Law.* The charter of Denver of 1904 provides for the erection of park districts, and the acquisition of lands for public parks; and that when the cost of a park site is determined the clerk shall give notice by advertisement for ten days in a newspaper of general circulation, specifying the cost of the improvements, and the share apportioned to each lot or tract in the district, and that objections filed within sixty days will be determined by the supervisors, at its first regular meeting, after said sixty days. By sec. 300 it is provided that at the meeting specified the Board of Supervisors sitting as a board of equalization shall hear all such objections, and may recommend modifications of the apportionment, and the Board of Public Works may make such modifications as seem just, or confirm the first apportionment, and the court shall then assess the cost of the improvements against all real estate in the district. Bill to

restrain the enforcement of an assessment against property of plaintiffs for the acquisition of lands as a park, the plaintiffs contending that by section 300 the Board of Equalization has power to suggest only alterations in the assessments, and property owners were thus without remedy. *Held* on the authority of Denver v. Londoner, 33 Colo. 104; Londoner v. Denver, 210 U. S. 373; Londoner v. Denver, 52 Colo. 15, that the provisions in question constitute due process of law, and that plaintiff having failed, after ample opportunity, to present their objections to the proper board, can not now be heard to question the regularity of the proceeding.

Error to Denver District Court, Hon. John H. Denison, Judge.

Mr. OMAR E. GARWOOD, Mr. BERT MARTIN, Mr. T. J. O'DONNELL, Mr. J. W. GRAHAM, and Mr. CANTON O'DONNELL, of counsel for plaintiffs in error.

Mr. JAMES A. MARSH, Mr. HENRY A. LINDSLEY and Mr. WALTER E. SCHWED, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

IN this action plaintiffs in error here, plaintiffs below, for themselves and others similarly situated, sought to have certain assessments against their properties declared null and void, and the City and County of Denver restrained from enforcing payment. The assessment alleged to be unlawful is that established by Ordinance No. 3, Series of 1913, of the City and County of Denver, for providing parks and parkways in the East Denver Park District. The ordinance sets out, as done, all the acts requisite to be done before the ordinance could be legally passed, and *prima facie* shows compliance with all the charter provisions under which the land was secured. The property affected by the ordinance is that comprising the East Denver Park District, the purpose being to provide funds for what is known as the "Civic Center," within such district.

Plaintiffs contest the regularity of the preliminary steps leading to the passage of the assessing ordinance, and also contend that due process of law is not afforded by the hearing provided for before the board of supervisors, sitting as

a board of equalization, since its action is not final, but advisory only.

A demurrer to the complaint was sustained and judgment of dismissal was entered accordingly, plaintiffs having elected to stand by their complaint and their cause as thereby made.

It is urged that section 300 of the charter of the City and County of Denver does not provide due process of law for taxation purposes. The section is as follows:

"At the meeting specified in said notice, or any adjournment thereof, the Board of Supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the Board of Public Works any modification of their apportionments. The Board of Public Works may thereupon make such modifications or changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the council of their final decision; and the council shall thereupon by ordinance assess the cost of said improvement against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

It is argued that as the board of equalization thus established has power only to suggest or recommend alterations in the assessments, protestants are without remedy. This is set up as a question never before suggested, much less urged, in any of the several cases in which like Charter provisions have been construed, providing for the assessment and collection of funds for public improvements.

Section 300, *supra*, supersedes section 31 of the Charter of 1903, which makes similar provisions for hearing complaints, except that the City Council is designated as the equalization board to recommend changes in assessments to the Board of Public Works. The constitutionality of section 31, was questioned in *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117, where plaintiffs contested the sufficiency of the petitions of the property owners of a paving district, the legality of the publication of the ordinance creating the district, the sufficiency of the published notice,

and the validity of the law creating the Board of Public Works. It was further contended that due process of law was not provided by the Charter, and that certain specific tracts of land were not benefited, and that the assessments were arbitrary and excessive. In substance, the same questions were raised in that case as are before us in this one. This court upheld the position of the City, and while the Supreme Court of the United States reversed that decision, it did so wholly upon a point which in no way affects any question herein involved. This case is ruled, therefore, by that case, except upon the point upon which it was reversed.

In discussing the inquiry whether the City Council, as a board of equalization, sitting for the purpose of hearing complaints, and with power only to recommend relief, is a competent and constitutional tribunal, this court in *City of Denver v. Londoner, supra,* after discussing *Brown v. City of Denver,* 7 Colo. 305, 3 Pac. 455, said:

"It is urged that because the judgment of the city council is not final, but its action is subject to revision by the board of public works, that therefore it is not a competent tribunal. The word 'competent,' as employed in the Brown case, does not convey any such meaning, but, rather, that the tribunal which the law designates shall be suitable, and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The main purpose of affording an owner a hearing upon the question of assessing his land for special benefits is to give him the opportunity to be heard upon the *quantum* of the tax which may be assessed upon his land, as well as its validity. If this hearing is afforded at some stage of the proceedings, he is given the opportunity to be heard which the fundamental law contemplates." (Citing *Bauman v. Ross,* 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. 966.)

Denver v. Kennedy, 33 Colo. 80, and *Denver v. Dumars,* 33 Colo. 90, were decided with *Denver v. Londoner, supra,* and in them other provisions relative to special improvement taxes, and matters pertaining to the construction of the Charter provisions were determined, in favor of the city.

The Supreme Court of the United States, in passing upon the constitutionality of the charter provisions, in *Londoner v. Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup Ct. 1108, decided that these provisions were sound, and afforded due process of law. At page 380 that court said:

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessments of benefits. It seems desirable, for the proper disposition of this, and the next assignment, to state the construction which the Supreme Court gave to the Charter. This may be found in the judgment under review, and two cases decided with it. (*Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *Denver v. Dumars*, 33 Colo. 90, 80 Pac. 114.) From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional assessment is certified to the city council, the land owners are afforded an opportunity to be heard upon the validity and amount of the assessment by the council, sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made. This hearing provided for by sec. 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant.' (33 Colo. 97) and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults."

And at page 378:

"The State Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provisions authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not."

And further, at page 380:

"The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. * * * Those interested therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of *Paulsen v. Portland,* 149 U. S. 30, 37 L. Ed. 637, 13 Sup. Ct. 750, because there was an implied power in the city council to give notice of the time of hearing. We think the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it."

In *Londoner v. The City and County of Denver,* 52 Colo. 15, the allegations of the complaint are substantially the same as in this case. The Londoner suit was brought on behalf of the plaintiff, and all others similarly situated in the East Denver Park District. It was alleged, as here, that the rules for apportioning the benefits were unreasonable and unjust; that there were irregularities, inconsistencies, conspiracy and fraud, in the preliminaries relating to the notices, protests, remonstrances, and the permission given to some protestants to withdraw their objections. The question of the power of the City to acquire land except by bond issue regularly approved by the electors, and whether the Charter provisions provided due process of law, were also

at issue. In that suit, as here, the cause was dismissed on demurrer. In disposing of the alleged lack of power in the municipality to acquire lands as provided in the Charter, this court, on page 24, after citing Hamilton on the Law of Special Assessments, sections 256, 257; and sections 307, 356 and 357 of Page & Jones on Taxation by Assessments, said:

"We therefore conclude that the people of the City and County of Denver, when making a provision for the municipality had the power to write therein provisions for the purchase of lands, or for the exercise of the power of eminent domain in acquiring lands for parks and parkways, and the payment therefor, in whole or in part, by collections arising from assessments made upon the property within the district specially benefited by the improvements and that the charter provisions in that respect are constitutional.

"2. The charter provisions authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the land necessary therefor shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to be assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time."

In reviewing the charter provisions relative to the acquirement of land for parks and parkways, the court, at page 29, said:

"The charter provisions, by the necessary implication, provide for two adjudications of the facts as to the sufficiency of the notice given and the remonstrances filed. One, a direct hearing before the board of park commissioners. The other, in the nature of a review of that hearing by the city council. * * * It would seem that the action of the board of park commissioners in finally determining 'that said land shall be acquired for said purpose,' would, if it were not for the other provisions of the charter, be a conclusive determination that the property owners assented to the improvement. But, be that as it may, as the charter

expressly declares that the findings of the council by ordinance as to such facts 'shall be conclusive in every court or other tribunal,' the duty to determine, as well as the conclusive effect of the determination of the city council, is fixed beyond doubt. Freeman on Judgments, sections 522, 523 and 524."

Plaintiffs in the case above cited asked for an injunction restraining the city council from passing the assessing ordinance. Prior to the determination of the suit on writ of error the ordinance was passed by the council. Upon this phase of the case this court, at page 36, held:

"The city council, in the exercise of the power vested in it by the Charter, and unrestrained by any existing authority, duly enacted an ordinance, declaring the existence of the essential facts. This ordinance has the effect of a statute; and the mandate of the people of the municipality, expressed through their charter, is, that such findings shall be conclusive upon every court or other tribunal. * * * Under these circumstances, we certainly do not have the power to nullify the legislative mandate, that the findings of the council shall be conclusive upon every court or other tribunal, and declare it is not conclusive upon us."

Fraud was charged as to the preliminary proceedings of the park board, in practically the same terms as in the case at bar. As to this, the court, at page 40, held:

"We are fully persuaded that upon the record as here presented, a court of equity can grant no relief to plaintiff in error."

In the case at bar, the contention of plaintiffs in error that the constitutional questions attempted to be raised are new, and afford valid ground for annulling all the proceedings of the city in the matter, is without foundation. This question was settled in *Londoner v. Denver*, 210 U. S., as shown by the quotation herein from page 380 of that opinion. As matter of fact, every contention made by plaintiffs in error is determined adversely to them by the rule of *stare decisis*, upon the authorities herein referred to, from which extracts are made.

The constitutionality of the provisions of the Charter as to hearing of complaints by the board of supervisors is not only settled by the rule of *stare decisis*, but is also *res judicata*, for in *Londoner v. Denver*, 52 Colo. 15, plaintiff brought suit upon behalf of himself and all others similarly situated in the East Denver Park District. Plaintiffs in error here were, and are, similarly situated, and they not only could have participated therein, but should have done so, and for this reason the judgment in that case is binding on them. Freeman on Judgments, 4th ed. 178; 2 Van Fleet's Former Adjudication, 569, 570; *Clark v. Wolf, et al.*, 29 Iowa 197, 207; *State ex rel. Brown v. C. & L. R. R. Co.*, 13 S. C. 290; *Lyman, et al. v. Faris et al.*, 53 Iowa 498, 5 N. W. 621; *Harmon v. Auditor, etc.*, 123 Ill. 122, 13 N. E. 161, 163, 5 Am. St. Rep. 502; *Cannon v. Nelson*, 83 Iowa 242, 48 N. W. 1033; *Ashton v. City of Rochester*, 133 N. Y. 187, 30 N. E. 334, 28 Am. St. Rep. 619, 623; 23 Cyc. 1269.

It is admitted that plaintiffs in error had ample time after lawful notice given to present their complaints and objections to the proper board, but failed and refused to do so. Under the authorities they cannot now be heard to question any of the acts of the City and County of Denver in the premises. *Fox v. Lipe*, 14 Colo. App. 259, 59 Pac. 850; *Pipe v. Smith*, 5 Colo. 116; *Walker v. Pogue*, 2 Colo. App. 109, 29 Pac. 1017. The judgment of the lower court should be affirmed, and it is so ordered.

Decision *en banc*.

Mr. Justice Teller and Mr. Justice Hill agree with the conclusion.

Mr. Justice Scott not participating.

No. 8881.

FIRST NATIONAL BANK OF FORT MORGAN v. DAILEY ET AL.

1. APPEAL AND ERROR—*Abstract.* Questions not presented by the abstract are not considered.
2. *Finding on Sufficient Evidence*, will not be disturbed.

Error to Morgan District Court, Hon. H. S. Class, Judge. Department.

Messrs. TAYLOR & PENDELL, for plaintiff in error.

Messrs. WORK & TWOMBLEY, for defendants in error.

Opinion by Mr. Justice Teller.

THE plaintiff in error was plaintiff below in a suit to foreclose a deed of trust which was given by defendant in error Daily to secure three notes, one for $4,000, and two for $1,000, each, payable to one Evans. One of these $1,000 notes fell due in October, 1913, and was paid; the other fell due in October, 1914, and the $4,000 note was due one year later. Interest was payable semi-annually. The More Investment Company was made a defendant as owner of the equity in the mortgaged property. A question is raised by the pleadings over Daily's obligation, under the deed of trust, to keep the buildings insured, the plaintiff claiming a right to recover sundry insurance premiums paid by it, but as the abstract does not include the deed of trust we are unable to determine that question; or as to the right in plaintiff to declare the whole debt due because of an alleged default in the covenant to insure. Parties are required to present in the abstract all parts of the record which are to be considered. At the time the second $1,000 note became due the holder thereof sent it to the plaintiff for collection. On November 7, 1914, Dailey borrowed of the plaintiff the sum of $1,200 with which to pay said note and interest.

This $1,200 note was not paid at maturity, and on April 7, 1915, according to the testimony of plaintiff's cashier, it acquired by purchase the $1,000 note due October 23, 1914, and the $4,000 note due one year later. On April 14, 1915, suit was begun to foreclose the deed of trust, it being alleged in the complaint that the plaintiff as holder of these two notes had elected to declare the whole debt due because of Dailey's failure to pay the interest due October 23, 1914. It was also alleged that the $1,000 note due on the last mentioned date was still unpaid.

The defendants contended that the $1,000 note, and all interest due in October, 1914, were paid by the $1,200 note, and that, consequently, there was nothing due when the suit was begun. The plaintiff, on the other hand presented evidence on the trial tending to sustain its claim that its agreement with Daily was that the $1,000 was to be held by it as collateral security to the $1,200 note. Dailey denied that there was such an agreement, and the books of the bank which were in evidence showed that said note and the interest coupons had been received for collection, and an entry of "paid" made as to each of them. On this clear conflict of evidence the trial court found for the defendants.

If the note and coupons were paid, there was no default which empowered the plaintiff to declare the $4,000 note due; hence the suit was prematurely brought and a nonsuit was proper. There is ample evidence to sustain the court's finding—which must have been that the $1,000 was not held unpaid as collateral—and we have no right to disturb it.

The judgment is affirmed.

Chief Justice White and Mr. Justice Scott concur.

No. 8901.

FIRST NATIONAL BANK OF DENVER v. AHRENS.

1. APPEAL AND ERROR—*Finding on Sufficient Evidence*, must be accepted.
2. PLEADING AND EVIDENCE—*Matter not Alleged*, will not be considered. Relief cannot go beyond the scope of the allegations.
3. ESTOPPEL—*By Conduct—Plea of*, must show that the defendant was misled to his prejudice by the conduct of which he complained.
4. ——— *Evidence*, to establish an estoppel must be clear and convincing.

Error to the Denver District Court, Hon. Charles C. Butler, Judge.

Department.

Messrs. HUGHES & DORSEY and Mr. E. I. THAYER, for plaintiff in error.

Mr. HARRY S. SILVERSTEIN, for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error had judgment in a suit to remove a cloud on the title of certain real estate owned by her, caused by a levy by the plaintiff in error under a judgment against her husband. It appears from the record that the plaintiff in said suit bought the property in question and took title to it; that some years later she conveyed the property to her husband to enable him, as she testified, to purchase a business. It stood in his name for some four years, when it was conveyed to her, on the husband's going to California to engage in business. This conveyance was made under date of February 25, 1913. The husband had been for many years a borrower from plaintiff in error, though he was not in business for himself, but held a position in a mercantile house in Denver. Judgment was obtained against him on a promissory note for $1,200, dated February 17, 1913.

For the bank it is contended that defendant in error is estopped to claim the property as against the bank's judgment, by reason of her having allowed her husband to appear to be the owner of the property and so constitute a basis for credit to him. The trial court, in finding for the plaintiff, held that there was no fraud in the conveyance by Ahrens to his wife, and that, while she might because of her negligence, have been estopped to claim the property so long as the title was in him, she was not so estopped after the property had been conveyed by him to her, it not appearing that he was rendered insolvent by the conveyance.

We are asked to review the evidence as to Ahrens' solvency, but as there is evidence sufficient to sustain the finding on that point we must accept it. It should be observed, also, that insolvency is not alleged in the answer, and hence it could not be relied upon, if it were shown by the evi-

dence. *Thomas v. Mackay,* 3 Colo. 390. Relief cannot go beyond the scope of the allegations.

The law thus applied by the trial court is well settled in this state. *Eppich v. Blanchard,* 58 Colo. 139, 143 Pac. 1035; *Wells v. Bank,* 23 Colo. 534, 48 Pac. 809; *Gwynn v. Butler,* 17 Colo. 114, 28 Pac. 468.

But the judgment may be sustained for another reason.

In *Davidson v. Jennings,* 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. 491, this court said:

"To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth."

There is no allegation in the plea of estoppel that reliance upon the supposed ownership by Ahrens resulted in injury to the bank, and had such injury appeared by the evidence, and the court found that it did not,—it would not have availed to establish an estoppel, because not pleaded. Moreover, the evidence falls far short of proving that the loan was made on the credit of the property in question. The officers of the bank who testified were clearly unwilling to say that they relied on that as security. They said they demanded more collateral, and that Ahrens insisted that they had enough, and that finally the loan was made upon the understanding that Mrs. Ahrens was to sign the note, "but it got through without her signature."

To work an estoppel and thereby deprive one of his property all the elements of an estoppel must be clearly established. In this case the evidence of the bank's reliance upon the record title, and its being induced to act thereon, is not clear and satisfactory; and the very important element of injury resulting from the conduct of the defendant in error is wholly lacking.

The judgment is accordingly affirmed.

Chief Justice White and Mr. Justice Hill concur.

No. 8940.

PEARMAN *v.* THE PEOPLE.

1. CONSTITUTIONAL LAW—*Title of Statute.* Sec. 1 art. V. of the Constitution must receive a reasonable construction.
   The title of the act being "An Act to compel men to support their children" a provision requiring the support of illegitimate children was approved.
2. CHILDREN—*Duty of Parent to Support.* Under c. 179 of the acts of 1911 the father of an illegitimate child, who, without lawful excuse, fails to provide for its support and education is guilty of felony.

Error to Jefferson County Court, Hon. Alexander D. Jameson, Judge.

Mr. ROY H. BLACKMAN and Messrs. CRUMP & ALLEN, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH and Mr. JOHN L. SCHWEIGERT, Assistant Attorneys General, for The People.

Mr. Justice Hill delivered the opinion of the court:

THE plaintiff in error was convicted of non-support of his illegitimate child. The action was under section 1 of our so-called non-support act, page 527, Laws 1911.

It is claimed that the portion of section 1, which refers to illegitimate children is void because not covered by the title. The portion of the title involved reads, "An act to compel men to support their wives and children." That portion of section 21, article V of the Constitution necessary to consider reads, "No bill, excepting general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." The claim is that the word "children" as used in the title, embraces only legitimate children, hence does not include illegitimate children provided for in section 1 of the act. "In its primary sense 'children' signifies offspring of the first degree." 5 Am. & Eng. Ency. of Law (2nd ed.), 1082 See also *Will*

of Scholl, 100 Wis. 650. "When used in statutes it (children) is not necessarily confined to children born in lawful wedlock, but may include natural and illegitimate children." 1 Corpus Juris, 752.

This constitutional prohibition must receive a reasonable construction. Its primary purpose is to avoid surprise and fraud upon legislators and people in the enactment of laws and to those over whom the laws are operative. This provision is sufficiently complied with so long as the legislation attacked is fairly germane to the subject-matter expressed in the title.

Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 42; *People ex rel v. Goddard,* 8 Colo. 432, 7 Pac. 301; *Edwards v. D. & R. G. R. Co.,* 13 Colo. 59, 21 Pac. 1011; *In Re Breene,* 14 Colo., 401, 24 Pac. 3; *Stocknan v. Brooks,* 17 Colo. 248, 29 Pac. 740; *Catron v. County Commissioners,* 18 Colo. 553, 33 Pac. 513; *In Re Pratt,* 19 Colo. 138, 34 Pac. 680; *Colo. M. & E. Co., v. Mitchell,* 26 Colo. 248, 58 Pac. 28.

When the purposes of this act are considered, we are of opinion that its title is sufficiently broad to embrace illegitimate children. It applies to men, not necessarily married men, and to compel them to support their children, not necessarily legitimate children. As here used the word "children" should be construed in its broadest sense.

In *Quattlebaum v. Triplett,* 69 Ark. 91, 61 S. W. 162, the court, at page 94, said:

"There is a distinction to be observed in the use of the word 'child' in statutes passed for the protection of children, and its use in the law of descents and distribution. In the former case 'child' means a person of tender years, without regard to parentage, while in the law of wills and intestacy age has nothing to do with the question, and parentage everything."

This declaration applies here. It is immaterial who the mothers of the children are, the title is general as to children. The act is more specific and mentions an illegitimate child or children, all of them are included in the word "children" as used in the title of the act. This principle

was applied in *Cecil v. Commonwealth,* 140 Ky. 717, 131 S. W. 781, Ann. Cas. 1912 B 501.

The judgment is affirmed.

Decision *en banc.*

No. 9220.

BALFE *v.* THE PEOPLE.

JURY—*Denial of Peremptory Challenge,* to one entitled, is error.

Error to Arapahoe District Court, Hon. Jesse C. Wiley, Judge.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH, Assistant Attorney General, for The People.

Chief Justice White delivered the opinion of the court:

IN impaneling the jury in this case, each side was entitled to three peremptory challenges. The prosecution exercised one such challenge, and, upon filling the panel, the defendant was called upon to challenge and passed. This was repeated until the prosecution had exercised its third challenge. A new juror was then called, qualified and excused upon the challenge of defendant. Another juror was called and qualified. The defendant then challenged this juror, and the court denied the right of defendant to do so. The defendant was entitled to the challenge he attempted to exercise, and the action of the court in the premises deprived him of a substantial right. *Moore v. The People,* 31 Colo. 336, 73 Pac. 30. This the Attorney General very properly concedes. The judgment is reversed and the cause remanded.

Decision *En banc.*

Judgment reversed.

No. 9264.

WESSELER *v.* BRINKMAN.

MINING CLAIMS—*Application for Patent—Adverse Suit.* A stockholder in a corporation entitled to a mining claim to which another applies for a patent, may not interpose an adverse claim and maintain an action in support of it.

Error to Ouray District Court, Hon. Thomas J. Black, Judge.

Mr. J. P. CASSEDY, for plaintiff in error.

Mr. T. W. EMERSON, for defendant in error.

Per curiam: en banc.

BRINKMAN applied for patent to certain mining claims and Wesseler adversed the same and instituted the cause of action here involved in support thereof. The complaint shows that at one time plaintiff was the owner of the mining claims for which patent was applied, or had some interest therein, but prior to the institution of this suit had conveyed all such rights to a certain corporation in consideration of some of its capital stock, which he now owns; that such corporation had attempted to convey such mining claims to others, and that while Brinkman apparently has title thereto, the real ownership of the claims was in the aforesaid corporation. Why plaintiff should seek to protect the rights of the corporation, alleged to be the owner of the mining claims, is not disclosed. The trial court very properly dismissed the complaint for failure to state a cause of action, and the judgment is affirmed.

Judgment Affirmed.

No. 9314.

TOWN OF OAK CREEK *v.* WILEY.

TOWN—*Liability to Attorney.* An attorney employed by the trustees of a town to defend an action against the municipality and the board of trustees, is entitled to recover of the town his reasonable fee in the premises.

Error to Routt District Court, Hon. John T. Shumate, Judge.

Mr. E. W. NORLIN, for plaintiff in error.

No appearance for defendant in error.

Chief Justice White delivered the opinion of the court.

WILEY is an attorney at law and recovered a judgment against the Town of Oak Creek, a municipal corporation, for the value of professional services which he claimed to have rendered it under a contract of employment. A suit in equity had been commenced in the District Court, wherein certain taxpayers were plaintiffs, and the municipality, its trustees and others were defendants. The purpose of that suit was "to have a receiver, with the powers of a referee," appointed for the municipality, and thereby "to preserve its funds and property and prevent the further waste and squandering and dissipation" of the same through alleged mismanagement by its trustees; and "that the said defendants, and each of them, their agents, employees, servants, attorneys and all other persons acting by, through or under them or any of them, be enjoined and commanded from interfering with such receiver or referee, and to turn over to said referee all matters and things belonging to said town, and that they be restrained and enjoined from paying any debts, save under the orders of the court"; and that a judgment be entered in favor of the plaintiffs, for the use of the municipality, against the individual defendants, for any and all sums found due and owing by them to the municipality, and for costs, together with full equitable relief in the premises. Upon service of the summons and copy of complaint, a meeting of the

board of trustees of the municipality was called and held. At this meeting a resolution was passed, by a majority vote of its trustees, whereby the town attorney was "empowered and directed to appear for the Town of Oak Creek, its board of trustees, its employees, and agents, and properly present to the court * * * answer to the summons and complaint," and that "W. B. Wiley and A. A. Mann be employed to assist the town attorney in the defense of said cause," and that the town attorney notify Mr. Wiley and Mr. Mann of the fact of employment. This was done and the three attorneys represented the defendants in the litigation. The instant case is for the reasonable value of the services rendered by Wiley in that cause, and it was stipulated that such claim "is against the said Town of Oak Creek only," and that the amount claimed for the services rendered and expenses incurred "are reasonable" if under the facts the municipality is liable therefor. The issues were found in favor of Wiley and judgment was entered accordingly. We are quite certain that this was correct. The application for *supersedeas* is, therefore, denied and the judgment affirmed.

Judgment Affirmed.

Decision *en banc.*

No. 9316.

TOWN OF OAK CREEK *v.* BOMIER.

TOWN—*Liability to Attorney.* An ordinance prescribed a monthly salary for the attorney, "for routine business and counsel," and provided that for special service "he shall receive such compensation as may be agreed upon." A resolution directed him to defend a specified action against the town and the trustees thereof. He was entitled to recover the reasonable value of the services rendered, though there had been no agreement as to the same.

Error to Routt District Court, Hon. John T. Shumate, Judge.

Mr. E. W. NORLIN, for plaintiff in error.

No appearance for defendant in error.

Chief Justice White delivered the opinion of the court.

THE only difference between the basic facts in this case and those in the *Town of Oak Creek v. Wiley,* Ante 30, decided at this term, is that defendant in error here was the town attorney of the plaintiff in error when the services, constituting the basis of this suit, were rendered, and the resolution directing him to perform the services did not expressly state that he was employed for that purpose. An ordinance of the town, however, designated a small sum per month as compensation for the town attorney "for routine business and counsel," and provided that "for special service he shall receive such compensation as shall be agreed upon by him and the board of trustees." Under such circumstances we think that the conclusions reached by the trial court were warranted. The application for *supersedeas* is, therefore, denied and the judgment affirmed.

Judgment Affirmed.

Decision *en banc.*

No. 8729.

MORSE v. RINDERLE.

Judgment of the Court of Appeals in Rinderle v. Morse, 27 Col. App. 457, affirmed.

Error to the Court of Appeals.

Mr. L. W. BURGESS and Messrs. BULLOCK & WALKER, for plaintiff in error.

Mr. SAM B. BERRY, Mr. N. C. MILLER, Mr. HENRY TUPPER, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

We have examined the record, briefs and opinion of the Court of Appeals in Rinderle v. Morse, 27 Colo. App. 457, and are of the opinion the conclusion reached therein, that the lower court was governed by the legal obligation rather than by equitable principles in the determination of the case, is correct. The judgment of the Court of Appeals in this regard is therefore affirmed and the cause remanded to the District Court for further proceedings.

Judgment affirmed.

Decision *en banc.*

No. 9315.

TOWN OF OAK CREEK *v.* MANN.

Judgment affirmed on the authority of *Oak Creek v. Wiley, ante.*

Error to Routt District Court, Shumate, Judge.

Mr. E. W. NORLIN, for plaintiff in error.

No appearance for defendant in error.

Chief Justice White delivered the opinion of the court.

The controlling facts in this case are the same as those in the Town of Oak Creek vs. Wiley, decided at this term. That decision is determinative of the questions here involved. The application for *supersedeas* is, therefore, denied and the judgment affirmed.

Judgment affirmed.

Decision *en banc.*

No. 8737.

SMITH *v.* FULTON INVESTMENT COMPANY.

Judgment of the Court of Appeals (27 Col. App. 279) affirmed.

CRUMP & ALLEN, for plaintiff in error.

EDWIN H. PARK, for defendant in error.

Error to the Court of Appeals.

Per curiam: en banc.

This writ of error is to review a decision of the Court of Appeals. Fulton Investment Company vs. Smith, 27 Colo. App., 279, 149 Pac. 444. We are satisfied with the conclusions of that Court and its judgment is affirmed, and the cause remanded to the District Court.

Judgment affirmed.

No. 9271.

CANON CRYSTAL ICE STORAGE, FUEL, AND MERCANTILE COMPANY *v.* TOWLER.

The evidence sustaining the finding below the judgment was affirmed.

Opinion by White, C. J.

Error to Fremont County Court, Eldred, Judge.

MARTIN M. BURNS, for plaintiff in error.

I. W. IBBOTSON, for defendant in error.

Towler, plaintiff below, recovered a small judgment against the defendant, plaintiff in error here. The cause of action was upon a note dated January 9, 1915, payable to the order of Towler, sixty days after its date, and signed "The Canon Crystal Ice Company, by E. M. Collins, Mgr." There was an allegation in the complaint to the effect that The Canon Crystal Ice Company was another name which the defendant corporation used in the transaction of its business. It was conceded that E. M. Collins was its manager, and the principal question was, whether he had authority to execute the note. The cause was tried to the court, and no declarations of law were made or requested. Therefore, the only question for consideration here is, did the evidence warrant the finding of the court in favor of the plaintiff? We have examined the record and approve the finding of the court. The judgment is, therefore, affirmed.

Judgment affirmed.

Decision *en banc.*

No. 9299.

BRADY v. BLAKESLEE ET AL.

Verdict upon conflicting evidence, supersedeas denied and judgment affirmed.

Error to Denver County Court, Hood, Judge.

HENRY HOWARD, JR., for plaintiff in error.

CAESAR A. ROBERTS and LESLIE M. ROBERTS, for defendants in error.

Opinion by White, C. J.

Blakeslee and his wife, plaintiffs in the trial court, claimed that they were the owners and in possession of certain household goods of the value of $1,200, which they stored in a public warehouse; that thereafter Brady obtained the warehouse receipt and, with the intent to commit a wilful wrong upon plaintiffs, seized and sold said goods without the knowledge or consent of plaintiffs; and, though often requested to pay and account to plaintiffs therefor, had refused so to do. Brady denied the alleged value of the goods, admitted the taking thereof, but claimed that his acts in that regard were in the foreclosure of a chattel mortgage upon such goods, held by the Muntzing-Brady Loan and Investment Company, a corporation, of which he was then and there the agent. The court

advised the jury that if they should find from the evidence that the property was taken by the corporation in the foreclosure of its chattel mortgage, defendant was not liable to plaintiffs therefor, but if the evidence established the fact that the property was taken by Brady individually, and not acting as the agent of the corporation, they should find for the plaintiffs. The jury found the issues in favor of the plaintiffs in the sum of $389.80, upon which the court entered judgment. Plaintiff in errror contends that there was no evidence to support the verdict or to authorize the court to permit the jury to determine whether or not the property was taken by Brady individually or as the agent of the corporation. We do not concur in this view. The jury was justified in believing that it was the warehouse receipt, not the chattel mortgage, that Brady used to acquire possession of the property. The warehouse man testified that Brady presented such receipt, and it was by virtue thereof that he got the goods, and the chattel mortgage was not presented. Brady alone testified that he was the agent of the corporation holding the mortgage, and was at the time acting for such mortgagee and sold the goods, applied the proceeds thereof upon the mortgage indebtedness and thereafter purchased of the corporation the balance of such indebtedness. Under this state of the record we think the court did not err to the prejudice of the defendant in submitting the whole matter to the jury. The application for *supersedeas* is, therefore, denied and the judgment affirmed.

Mr. Justice Hill and Mr. Justice Teller concur.

Judgment affirmed.

No. 9259.

BOTT v. THE PEOPLE.

Supersedeas denied and judgment affirmed.

Error to Larimer District Court, Hon. Robert G. Strong, Judge.

T. J. LEFTWICH and L. R. TEMPLE, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. BERTRAM BESHOAR and RALPH E. KERWIN, Assistant Attorneys General, for The People.

Per curiam:

The plaintiff in error was convicted of the violation of our age of consent act, and brings the case here for review.

A careful examination of the record fails to disclose any prejudicial error. The application for supersedeas will be denied and the judgment affirmed.

Supersedeas denied: Judgment affirmed.

Decision *en banc.*

No. 8863.

LEVY CONSTRUCTION COMPANY v. MCGONAGLE.

Error to Moffat District Court, Hon. John T. Shumate, Judge.

Mr. FRANK MCLAUGHLIN and Mr. WALTER M. APPEL, for plaintiff in error.

Per curiam:

We have considered the assignments of error and the record in this case, and are of the opinion that the court was justified in the conclusions reached and in the rendition of the judgment entered. The judgment is therefore affirmed.

Judgment affirmed.

Per curiam.

White, C. J., not participating.

January Term, 1918

No. 8232.

WESTERN INVESTMENT & LAND COMPANY v. FIRST NATIONAL BANK OF DENVER.

1. PRINCIPAL AND AGENT—*Ratification.* If the principal, upon partial acquaintance with the attending facts, and without full inquiry, deliberately ratifies the act of the agent he will not be heard to question the effect of his action on the ground of want of knowledge.

The testimony examined and held to warrant a finding of ratification.

2. WITNESS—*Competency.* A defendant who has suffered a default, may, under Rev. Stat. sec. 7284, be called and examined by plaintiff.

3. EVIDENCE—*Competency.* A witness is not to be interrogated as to the ownership of a chattel where his testimony must involve a construction of the facts proved.

4. —— *Declarations of Agent as to His Authority,* made by the general manager of a corporation, as part of the transaction in question, he having power to make contracts on behalf of the corporation, are admissible.

5. ESTOPPEL—*By Conduct.* Where a corporation as the consideration for its endorsement of a promissory note receives an article of personal property, retains and uses it in its business, all question of the authority of the agent making the endorsement is eliminated. The corporation in such case, being estopped to deny its liability on its endorsement, irregularity in the face of the paper is not to be called to the attention of the jury, as notice to the endorsee, as want of authority of the agent making the endorsement.

6. INSTRUCTIONS—*Refusal,* giving the substance, is not error.

Error to Denver District Court, Hon. Geo. W. Allen, Judge. En banc.

Mr. HOWARD J. CLARK, Mr. L. WARD BANNISTER and Mr. LEROY MCWHINNEY, for plaintiff in error.

Mr. N. WALTER DIXON, Mr. HARRY E. KELLY and Mr.

CHARLES H. HAINES, for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error brought suit against the plaintiff in error on a promissory note upon which the latter appeared as indorser. Verdict for plaintiff and judgment accordingly.

The note was executed by one Macarthy to the defendant below, he being at the time the president and manager of defendant company, was indorsed in the name of said company, and delivered to one Colburn in payment for an automobile. The note was subsequently, and before maturity, transferred to the plaintiff. Presentment and protest were duly made.

The defense was and is that the note was never delivered to the defendant, and that it never indorsed the same. It is alleged in answer that the indorsement in the name of the company was made by said Macarthy, who was also the maker of the note, of which fact Colburn had knowledge when he received the note; that Macarthy had no authority to execute and deliver to defendant the said note; that it never owned the note; and that the automobile was purchased by Macarthy for his own use, and not for the defendant.

There was evidence as to the defendant's business, of which Macarthy was in sole charge in this state; of the contract of purchase of the automobile; of the use of cars in the business; of the knowledge of some of the directors of such use; of advertising by the company that it used automobiles in its business of selling lands; of differences between Macarthy and his father-in-law, who owned more than one-half of the stock of the defendant company; of a transfer of Macarthy's stock to his father-in-law; of a charge of $10,005.95 against Macarthy on the company's books; of a resolution by the directors, and the stockholders, approving and confirming all the acts of Macarthy as president; and of his ceasing to have any connection with the defendant.

The court submitted to the jury the question whether Macarthy purchased the automobile for himself individually, or as manager for the company, and for it; also, if purchased for the company, whether Macarthy had authority to make the purchase and execute the note in suit to pay therefor.

The jury was instructed that they should find for the defendant unless they found that Macarthy had authority to purchase an automobile for the company, and did so purchase the automobile in question; and that he had authority to indorse and deliver the note in suit; or that his act in so doing was ratified by the company.

We can not agree with plaintiff in error that there is no substantial evidence from which authority on the part of Macarthy either to buy the automobile, or to indorse the note for the company, may be inferred. From the evidence above recited the jury might reasonably find that Macarthy had authority to buy the automobile, and to indorse the note as he did.

Neither do we think that the court erred in refusing to give an instruction "that there can be no ratification of an unauthorized act done in corporation's behalf, unless the act is known to the ratifying authority, and is, therefore, approved."

The requested instruction stated a general rule, to which, however, there is a well-known exception, within which the case at bar falls.

We are dealing here not with acts from which a ratification may be inferred, but with an *express* ratification.

It is well settled that if a principal deliberately ratifies upon such knowledge as he has, assuming such risk as there may be in failing to make full inquiry, he is bound, and can not avoid the effect of his act on the ground of want of knowledge. *Ehrmantraut v. Robinson,* 52 Minn. 333, 54 N. W. 188; *Stokes v. Mackay,* 19 N. Y. S. 918, 64 Hun. 639; *Wilder v. Beede,* 119 Cal. 646, 51 Pac. 1083; *Kelley v. N. H. Ry. Co.,* 141 Mass. 496, 6 N. E. 745; Mechem on

Agency, Sec. 393, *et seq.* (2nd Ed.); and Ewell's Evans on Agency, p. 82.

The testimony of J. K. Gilcrest, who owned more than one-half of the stock, was that:

"In the settlement it was included that Macarthy turned the stock back. By settlement I mean when the new books were opened and an accounting made with him and myself. The ratification resolution was a part of the settlement. The agreement was that if Macarthy would turn over the stock to me the corporation would ratify all of his acts as president and general manager to that date. The transaction was entirely carried out between me and Macarthy and the company, and Macarthy turned over his stock to me. Macarthy's indebtedness to me was paid in the form of a company indebtedness to me, pursuant to that agreement."

Reading the resolution of ratification, with its all inclusive terms, in the light of this testimony, it can not be said that the jury was not justified in finding that the purchase of the automobile, and the indorsement and delivery of the note, were ratified and approved. It is a fair and natural inference from the facts in evidence that the defendant company, as a consideration for the surrender by Macarthy of his stock, agreed to become responsible for all that he had done. The language of the resolution of ratification fully justifies this conclusion.

It also appears that Macarthy was charged with $10,005.95, and the witnesses for defendants now disclaim all knowledge of the items of that indebtedness. They can not explain the charge.

We can not say that the jury might not properly infer that the sum so charged was itself a consideration for the company's assumption of liability for Macarthy's acts, known or unknown.

Objection is made to the testimony of defendant Macarthy—call by the plaintiff for examination under section 7284, R. S. 1908—on the ground that he had already suffered default; and cases from Wisconsin and Minnesota are

cited to support the objection. In the Minnesota case, *Suter v. Page,* 64 Minn. 444, 67 N. W. 67, it was held not error to reject such testimony, the court declining to determine whether or not the trial court, in its discretion, might not have admitted the testimony.

In *O'Day v. Meyers,* 117 Wis. 192, 94 N. W. 48, the court gives as a reason for holding the testimony inadmissible the fact that the other side has no right to cross-examine the witness. Under our practice a witness thus called may be examined by both sides, and the reason which apparently induced the holdings mentioned does not exist here.

Clearly, if a party called as an adverse witness appears to the trial court not to be adverse, he should not be held to come within the statute in question; and, as the Minnesota case recognizes, the matter should be left largely to the discretion of the court.

We do not think it was error to admit the testimony to which the objection is made, especially as the witness was fully cross-examined.

It is further objected that the trial court erred in striking out the following question and answer:

"Q. Did it (the company) ever own the limousine machine? A. No."

Counsel cite authorities to support the statement "that a witness may always answer a question as to the ownership of personal property."

The statement is too broad, and is not supported by the cases cited. Where the question involves a fact clearly within the knowledge of the witness, and does not call for the expression of an opinion upon facts proven, it is admissible. But where the testimony involves the construction of the facts proved, it is not competent. *Nicolay v. Unger,* 80 N. Y. 54. In *Pichler v. Reese,* 171 N. Y. 577, it is said:

"There is a distinction between asking a witness to testify to a fact, the existence of which depends upon an inference from a collection of facts * * * and asking

him to testify to a fact which is necessarily within his knowledge."

Here the witness was called upon to testify to a fact of which he had only such knowledge as might be acquired from the facts proved, and the testimony was not admissible.

Complaint is made also that the witness Colburn was permitted to repeat the declarations made to him by Macarthy as to the latter's authority in behalf of the defendant; and that Macarthy was allowed to testify to the same declarations.

This testimony, it is said, violates the rule that an agent's authority can not be established by his own declarations. But that is not this case. That Macarthy was the president and manager of the company is beyond dispute. The answer admits that he was president of the company, and the by-laws, in evidence, make the president the general manager, with power to make contracts on behalf of the corporation.

The testimony was concerning declarations of one whose agency was established, and was competent as a part of the transaction in controversy. *R. E. Lee Co. v. O. & G. S. & R. Co.*, 16 Colo. 118, 26 Pac. 326.

There was evidence from which the jury might properly find that the automobile was bought for the defendant, was used in its business, and became its property. That being so, the defendant received a consideration for its indorsement, and is bound by it. *Pelton v. Spider Lake Sawmill Co.*, 132 Wis. 221, 112 N. W. 29, 122 Am. St. 963; *Lyon Potter Co. v. Bank*, 85 Fed. 120, 29 C. C. A. 45; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Hayes v. Galion Gas Co.*, 29 Ohio St. 340; and *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

This eliminates all question as to right of Macarthy to execute or indorse the note for the company.

This fact, that is, that the defendant is estopped to deny its liability on the indorsement, fully meets the objections to the first three instructions, which are alleged to be bad

because they ignore the proposition that the irregularity on the face of the note was notice to the indorsee.

The objection to instruction number 5 is that the jury were permitted to take into consideration implied or apparent authority in the president and manager to indorse the note. We see no merit in the objection.

Nor do we find error in the refusal of instructions. The substance of some of them was given, and the others do not correctly state the law as applied to the facts.

Finding no error in the record, the judgment is affirmed, and the former opinion is withdrawn.

Judgment Affirmed.

Mr. Justice Allen not participating.

Mr. Justice Scott dissents.

No. 8722.

O'BRIEN ET AL. *v.* MILLER ET AL.

1. JUSTICE OF THE PEACE—*Judgment—Presumptions.* No presumption is indulged in favor of the judgment of a justice. Jurisdiction must affirmatively appear.
2. —— *Docket.* Under Rev. Stat. sec. 3892, the docket of a justice must in every case show the amount and nature of the plaintiff's demand. The judgment will not be referred to, to supply the omission of the required statement.
3. —— *Evidence Aliunde,* may supply the omission.
4. —— *Burden of Proof,* is upon the one claiming under the judgment.

Error to the Court of Appeals.

En banc.

Messrs. TOLLES & COBBEY, for plaintiffs in error.

Mr. JOHN HIPP, Mr. W. W. WHITE, Mr. N. W. DIXON, for defendants in error.

Opinion by Mr. Justice Teller.

PLAINTIFFS in error had judgment in the District Court in a suit to cancel a judgment in the court of a justice of

peace, and to set aside several deeds of conveyance following a sale on execution under said judgment. This judgment was reversed by the Court of Appeals, and we are now to determine as to the correctness of that judgment. The court considered three propositions presented on that review. First, that the action was barred by a former judgment between the parties; the court found that the plea was not sustained by evidence. Second, that the judgment in the justice court was defective in form. Third, that the evidence in the cause affirmatively shows a lack of jurisdiction of the justice of peace to render the judgment. On both of these propositions the court found against the present plaintiffs in error. *Miller v. O'Brien*, 27 Colo. App. 511, 150 Pac. 327.

We can not agree with the conclusions of the Court of Appeals on the third proposition. The contention thus disposed of was that the docket of the justice of peace did not comply with the provision of the statute—Sec. 3892, R. S. 1908—which requires that an entry be made of "the amount and nature of the debt sued for." The record of the justice court, as shown in evidence, states nothing as to the amount of the demand, or nature of the debt, and there is nothing in the record showing how much was claimed by the plaintiff. The statement required by the statute is not supplied by reference to the amount of the judgment. This is expressly ruled in *Liss v. Wilcoxen*, 2 Colo. 85. That case also holds that an omission from the docket of a justice of peace of matters necessary to confer jurisdiction may be supplied by proof *aliunde*. The fact that it might be so supplied is given as a reason by the Court of Appeals for sustaining the jurisdiction of the justice court, it being assumed that the supplying of the omission was the duty of the plaintiffs below. Clearly such is not the case. The record of a justice court is *prima facie* evidence of what occurred, but there are no presumptions in favor of the judgment, and the matters showing jurisdiction must affirmatively appear. "Nothing shall be intended to be within the jurisdiction of an inferior court

but that which is expressly alleged." *Downing v. Florer*, 4 Colo. 209. In *Liss v. Wilcoxen*, supra, it was held that the requirement that the amount and nature of the debt be stated in the record was jurisdictional, and, further, that a transcript of the docket not showing the amount and nature of the debt did not establish the jurisdiction of the justice court.

When, therefore, the plaintiffs below introduced in evidence a transcript of the justice docket, not showing all the matters required to confer jurisdiction, a *prima facie* case was made that the court had no jurisdiction. It was for the defendants then, if they could, to supply the omission, and make it affirmatively appear that the court had jurisdiction. Having failed so to do, the *prima facie* case made by plaintiffs was not overcome, and the plaintiffs were entitled to judgment.

Some of the members of the court are of the opinion that the Court of Appeals erred in holding the judgment good in form, but, as the judgment must be reversed on the ground last mentioned, no opinion is expressed on that ruling.

The judgment of the Court of Appeals is accordingly reversed and the cause remanded to the District Court, whose judgment is affirmed.

Judgment Reversed.

Mr. Justice Bailey, Mr. Justice Garrigues and Mr. Justice White dissent.

GARRIGUES, J., *Dissenting.*

I can not agree with the majority opinion. O'Brien and others, as plaintiffs, brought an equitable suit to have declared void a justice judgment, and a deed based thereon cancelled.

In the Wilcoxen case cited in the majority opinion, Liss was in posession, and Wilcoxen brought an unlawful detainer suit to obtain possession, upon a deed based upon a justice judgment. At the trial Wilcoxen introduced the justice docket as the basis of his deed and right of posses-

sion. Liss objected to the docket being introduced in evidence, because the amount and nature of the debt sued for was not noted thereon, which objection was overruled, and the admission of the docket in evidence was assigned as error. We held it was not error to admit the docket in evidence, because the judgment was not void upon its face on account of such omission; that the docket being silent on account of the omitted matter, the omission could be supplied by proof *aliunde*. Wilcoxen brought the suit to oust the party in possession, and of course had the burden of proof, therefore it was up to him to supply affirmatively the omission.

In the instant case it was the defendant, not plaintiff, who held the deed, and plaintiff brought the suit, not to sustain, but to have the judgment declared void, and the deed cancelled. Plaintiff seeks affirmatively to destroy the judgment and the deed based thereon, not to uphold them. To do so, plaintiff introduced in evidence the justice docket, which omitted to show the amount and nature of the debt sued for, and claims that made his case. But that did not destroy the judgment, without affirmative proof *aliunde* showing that the amount and nature of the debt sued for was not within the jurisdiction of the justice, and plaintiff, though he had the burden, failed to supply such proof. He claims, after he introduced the docket, that the burden was upon defendant to prove affirmatively the omitted matter giving the justice jurisdiction. The omissions in the docket raise no presumption that the judgment was void. Plaintiff had the burden of proving it was void, and merely introducing the docket, showing the omission and nothing more, did not supply the proof. Plaintiff was not seeking, like Wilcoxen, to enforce the judgment, but was seeking affirmatively as plaintiff to destroy it, therefore the burden was upon him to do more than merely introduce the docket. He had to prove the matters which would destroy the judgment. Wilcoxen, by bringing the suit to oust Liss, assumed the burden of sustaining the deed by supplying the jurisdictional matters omitted. In the instant case, plaintiff by

bringing suit was seeking affirmatively to destroy the deed, and the burden of proof was upon him to show that the nature and amount of the debt sued for was not within the jurisdiction of the court. He had to supply proof of the omitted matter which would destroy the judgment.

I am authorized to state that Mr. Justice White concurs in this view.

Decided July 2, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8728.

SHAFFER v. GEORGE.

1. CONTRACTS—*Construed.* The purchaser of the properties of a newspaper publishing company agreed to assume "all current liabilities" of that corporation. He was bound for the rents accruing and to accrue, for which the newspaper company was responsible.
2. LANDLORD AND TENANT—*Covenants Running with the Land.* The covenant to pay the rent, and the covenant to surrender, run with the land, and bind the assignee of the tenant.
3. —— *Abandonment by Tenant,* does not terminate the lease, nor the tenant's liability upon his covenants. He cannot accomplish an eviction by his own act.
4. —— *Assignee of Tenant,* is liable only for the covenants broken while he is in possession.
5. APPEAL AND ERROR—*Party Bound by Position Below.* A party who tries his case, throughout, upon one theory, will not be heard to contend upon a different theory in the court of review.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. M. H. KENNEDY, Mr. L. M. GODDARD, for plaintiff in error.

Messrs. BARTELS, BLOOD & BANCROFT, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

ON the 10th day of June, 1910, the defendant in error, Herbert George, entered into a written contract of lease with Jared Newell Husted, whereby the said George leased to the said Husted a building and premises at 1735 to 1737 Champa street, in the city of Denver, for the term of one year, with the privilege to Newell, at his option, to extend the period for which said lease was to run an additional five years.

The lease provided that Newell should have the right to assign it to a corporation to be organized for the purpose of publishing a daily newspaper. Thereafter Newell assigned the lease and delivered possession of the premises to The Denver Times Publishing Company. This company secured an extension of the lease, under its terms, for a term of five years from the 10th day of June, 1911. The lease provided for monthly payments as rent of $500, and further, that in case the lessee should occupy the second floor of the building, which might be done upon the lessee securing a vacation thereof by the occupying tenants, the monthly rental in such case should be $650.

On or about the 15th day of January, 1912, the Times Company sold its newspaper property, and assigned the lease, to the Speer Publishing Company. This company acquired the second floor, and thereafter occupied the entire building, and for which it paid the monthly rental of $650, as provided in the lease, and continued to so occupy the building until the date of the removal of the newspaper plant and the abandonment of the premises.

On the 21st day of October, 1913, the plaintiff in error, John C. Shaffer, purchased all the stock and bonds of the Speer Publishing Company. As a part of the consideration for the sale to and purchase by Shaffer of the stock and bonds of the Speer Company, Shaffer agreed to and did assume "all current liabilities" of the Speer Company.

On or about the 25th day of October, 1913, the newspaper property was removed from the premises, and the Speer

Company and Shaffer declined to pay further rent under the lease. George declined to accept the keys to the building or to release the lessees, and did not do so until the 26th day of September, 1914.

This suit is to recover the rent under the terms of the lease, from the date of removal from the building until September 26th, 1914, and for damage to the building under the covenant in the lease to leave in good repair. The lease under the extension was to expire by limitation of time on the 10th day of June, 1916. Verdict and judgment was rendered in favor of the plaintiff in the sum of $10,900.

The covenant in the lease under which the plaintiff claims damages to the building is as follows:

"And the said party of the second part covenants with the said party of the first part that the said second party has received said demised premises in good order and condition, and at the expiration of the time of this lease will yield up the said premises to the said party of the first part in as good order and condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted, and also will keep said premises, including all gas pipes, water pipes, electric wires and sewer connections in good repair during this lease at his own expense."

The errors assigned are substantially embraced in objections to a part of the instruction of the court, which reads as follows:

"You will find a verdict for the plaintiff, and against the defendant, John C. Shaffer, in the sum of $7,150 for rent due, and also in such further sum not exceeding $8,000 as you find from the preponderance of the evidence that it would cost on September 26, 1914, to then place the leased premises in as good order and condition as they were in when the lease was executed, to-wit, on June 10, 1910, ordinary wear excepted. In this connection the court instructs you that if you find from the preponderance of the evidence that the plaintiff at or before the time he executed

the lease, or at or before the time he assented to the assignment of the lease by The Denver Times Printing and Publishing Company to The Speer Publishing Company, knew that the premises were to be used for conducting a newspaper or printing and publishing business, then the words 'ordinary wear' as used in the lease mean such ordinary wear as buildings are ordinarily subjected to in the conduct of the newspaper or printing and publishing business; but this does not include the removal or condition to the building of walls or partitions, nor does it include other substantial changes or alterations in the structure itself."

The objections to the direction of the court to find for the plaintiff for the rent are: (a) that the guaranty of the defendant to pay "current liabilities" does not create a liability to pay rent under the terms of the lease, and (b) that the question as to when the lease was terminated should have been submitted to the jury.

The Speer Company was the assignee of the lease, and admittedly liable upon all covenants therein. Shaffer assumed "all current liabilities" of the Speer Company. The word "current" is defined by the authorities as "running, moving, flowing, passing; passing from one to another, especially, widely circulated, publicly known, general, prevalent, as, the current ideas of the day; now passing; present in its course; as, the current month of the year." 2. Words and Phrases, 1790; 8 Am. and Eng. Enc. Law. 498.

It is quite clear that the monthly payment of its rent under the terms of the lease was a liability present in its course of business, and was therefore a current liability of the Speer Publishing Company. The contract of lease was in existence at the time of the guaranty, and was not a liability to arise in the future, but then existed. *Hart v. Wynne*, 40 S. W. 848. (Texas Civ. App.)

It is the accepted rule of law that covenants to pay rent and to yield up the premises in a required condition are covenants which run with the land, and that an assignee

of a lease who accepts it is liable on these covenants. Indeed, plaintiff in error cites the well considered statement of the rule from Jones on Landlord and Tenant, Sec. 455, as follows:

"An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land, but in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term. When the assignee accepts the assignment of a lease, he is charged with knowledge of the covenants therein and takes it *cum onere*, subject to the payment of the rent which shall thereafter become due, and to the performance of the covenants running with the land which, by the terms of the lease, the lessee was bound to perform. Because of privity of estate he is liable upon covenants maturing and broken while the title is held by him. The law has been stated to be that 'the assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this, without reference to any obligation assumed by him in the contract of assignment.' The original lessee is bound by the contract to make the payments. The assignee is bound by his acceptance of the lease to make good the covenant to pay rent therein contained. His liability is upon the covenants and arises not from any express assumption or agreement to pay it, which might be contained in the written assignment, but from the privity of estate by reason of his ownership and right to enjoy the benefits of the lease.

The assignee is in privity of estate, but not in privity of contract with the lessor, and is only liable on covenants which run with the land, such as covenants for rent, to pay taxes and to yield up premises in good repair."

To the same effect see 1 Underhill on Landlord and Tenant, Sec. 386, where the reason for the rule is stated to be:

"Any liability the assignee of the lessee may have is only incumbent upon him because of the equitable principle that he who enjoys the benefits of an existing condition of af-

fairs can not shift its duties. After the assignment the assignee has the sole right of possession under the lease, and having this right, he must accept the accompanying duty or duties. The right of possession and the enjoyment of possession impose upon him the obligation to return their equivalent. Hence, he must do for the landlord everything that his assignor had agreed to do as an equivalent of the enjoyment of the premises. This class of covenants which are by a fiction said to run with the land comprise all those which involve the doing of something to or about the land itself. They are very numerous and include almost every conceivable covenant which can be inserted in a lease. It is not necessary where by its nature a covenant runs with the land that it shall contain the word 'assignee' or 'assigns.' "

To sustain the contention of plaintiff in error that the assumption of all current liabilities does not include liability on the lease he cites *State v. County of Marion*, 21 Kan. 419, and *The Matter of Assignment of Henover*, 70 Hun. 56, 23 N. Y. Supp. 1092. These authorities do not, in our opinion, sustain the contention, nor vary the rule as above stated. In the former case it was simply held that the board of county commissioners have no power to appropriate funds raised by taxation to defray current expenses, for the erection of permanent county buildings, and particularly in view of statutes providing specifically for the creation of funds for the construction of permanent county buildings. The latter case involved an assignment for the benefit of creditors, and is not in point.

It is further contended by plaintiff in error that he is not liable on the covenant to yield up the premises in good repair at the expiration of the lease, for the reason that the lease had not expired by the efflux of time, but by expiration on cancellation. This contention can not be sustained either upon principle or authority.

The rule of law in this regard is stated in 2 Underhill on Landlord and Tenant, Sec. 534, to be:

"The question what is meant by the words 'expiration of the term' may arise where the lease is surrendered before the term has expired by the lapse of time. Unquestionably the parties to such a covenant 'by expiration of the term' mean in most cases that no cause of action shall accrue until the end of the full term caused by the natural efflux of time. But a lease may expire in many other ways than by lapse of time, as, for example, by the taking of the premises for public uses, by certain wrongful acts of the tenant, by surrender or eviction. And where the term thus expires, it is as much at an end as if it had expired by the lapse of time. Neither party can thereafter obtain any rights under it, though either may enforce against the other any rights of obligation which may have accrued theretofore. Hence, where a lease is surrendered during the term by the agreement of the parties, a cause of action on a covenant to surrender in good condition at the expiration of the term at once accrues to the lessor, and if the premises are not returned in good condition at the time of the surrender, the lessor may sue at once for damages.

Counsel cite *Reed v. Showhill*, 51 N. J. L. 162, 16 Atl. 679, 33 L. R. A. 683, to the contrary.

If this case can be said to sustain the contention, it is without precedent, and, so far as we are aware, has never been followed. On the contrary, it has been expressly repudiated. *Marshall v. Rugg*, 6 Wyo. 270, 45 Pac. 486, 33 L. R. A. 679, and authorities cited.

The plaintiff in error further contends that the Speer Company had transferred all its interest in the lease to the Denver Publishing Company on October 31, 1913, and had therefore gone out of possession at that time.

There is no such testimony in the record. It is true that the complaint alleged, upon information and belief, that on January 30, 1914, the Speer Company had assigned its interest in the lease to the Denver Publishing Company, an original party to this suit, but this allegation was denied, and there was no proof of such an assignment at any time, and because of this failure of proof, the trial court dis-

missed The Denver Publishing Company as a party defendant. Therefore, so far as it appears from the proof, the Speer Company continued as the assignee of the lease, in legal possession, until the lease was terminated.

The mere abandonment of the premises did not operate to destroy the estate of the Speer Company. There was no evidence tending to show that the owner accepted the surrender of the lease at that time, or until September 26th, 1914.

It was said by this court in *Symes Investment Co. v. Wheelock,* 55 Colo. 459, 136 Pac. 65, that:

"It is fundamental that a tenant can not, by voluntarily surrendering possession of the premises, evict himself. *Letteck v. Holland,* 63 Ill. 335. The renting of other quarters by defendant, notice of vacation on a certain date and vacation of the premises accordingly constituted an abandonment, and entry thereafter by the landlord was not an eviction. *Humiston et al. v. Wheeler,* 175 Ill. 516, 51 N. E. 803. It is essential to even constructive eviction that the conduct of the landlord be more than a mere trespass and such as to effectually deprive the tenant of the use and benefit of all or some part of the premises. 2 Underhill on Landlord and Tenant, Sec. 670, 671."

To the same effect is *Fehringer v. Wagner Co.,* decided by this court, 61 Colo. 359, 157 Pac. 1071.

It is further urged that under the well settled rule of law an assignee of a lease is liable only for the covenants broken while he is in possession; that Husted and The Times Company committed the acts complained of as to the condition of the property, and therefore the Speer Company was not liable. The principle of law must be conceded, but the record does not justify the statement of fact.

It is not disputed that the Speer Company alone took over, arranged and occupied the second floor, which was at no time used or occupied by The Times Company.

The testimony does not separate the amounts of alleged damage as between The Times Company and the Speer Company. No effort was made by the defendant to do so,

nor was objection made to the introduction of evidence covering damage for the entire period of the lease.

The case was tried upon the theory of liability or no liability for the entire period.

The testimony of plaintiff's witnesses fixed the damages at $8,800. The testimony of defendant's witnesses fixed the damage at $1,306. The jury found the damages to be in the sum of $3,750. Whether or not this finding included damage occurring during the period of the occupancy by The Times Company is not made clear.

Upon the trial, the theories of the partners were stated by counsel to be:

"So we are suing for this $7,150 rent and for $8,000 that we contend it will cost the plaintiff to restore this building to its original order and condition."

And by defendants' counsel:

"Instead of being a building which is absolutely unrentable, we will show you, instead of its taking $6,000 or $7,000 to put this building back, we will show you by competent contractors of this town that it would not take more than $1,100 to put the building absolutely in as good rental shape as it was when it was rented. The evidence will show that whatever damage was done to the building during the occupancy was the result of what can be considered ordinary wear and tear in the business of the publication of a newspaper. And so the defendants disclaim any liability under this lease, any liability to pay rent, or any liability to respond for damages to the building by virtue of any negligence or anything else."

The testimony of both parties was directed to the condition of the building in June, 1910, when the lease was executed, and its condition on September 26th, 1914, when the lease was terminated. It will thus appear that the theory for which plaintiff in error now contends is a new and entirely different one from that presented on the trial. Then, the theory was as to liability of defendant under the covenants of the lease from its inception to its termination. Now, upon error, it is contended that recovery may be had

during a period only between the assignment of the lease to the Speer Company and the abandonment of the property. There is no better settled rule of this court than that one who goes through a trial upon the theory that a certain matter is in issue will not be heard to say in the event of review that there was no such issue. It was the clear duty of the defendant to properly assert and prove his contention upon the trial, and his failure or neglect to do so was at his peril.

The language of the court in *Savage v. Central Elec. Co.*, 59 Colo. 66, 148 Pac. 254, applies with equal propriety and force to the circumstances of this case. It was there said:

"It is now contended by plaintiff that the answer contains no sufficient plea of breach of contract. No attempt was made below, either by motion or otherwise, to make the answer more specific, definite and certain. Its averments were put in issue and plaintiff made no objection to the introduction of evidence by the defendant tending to prove the claimed breach, but, on the contrary, offered evidence at length in denial thereof. The sufficiency of the answer to present the question of a breach of the contract is urged for the first time in this court. The pleading was treated by the parties as presenting that issue and trial had on that theory, and therefore any insufficiency of the pleading in this respect must be regarded, upon review, as waived. In other words, a party who tries a cause on the theory that a given matter is in issue, when defeated on that proposition, will not thereafter be heard to say there was no such issue. *D. T. & Ft. W. R. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681."

The defendant can not now complain, if admitting his failure to present the issue upon the trial. If this court is to assume issues not presented to the trial court, the result will be prolonged, if not interminiable litigation. Beside, in fairness and justice to the trial court, only such issues as are there presented should be reviewed here.

The judgment is affirmed.

En banc.

Bailey, J., dissenting.

Garrigues, J., concurring in part and dissenting in part.

White, C. J., not participating.

GARRIGUES, J., *Dissenting.*

As to the part of the opinion holding Shaffer liable for the rent, I concur. As to the part relating to damages to the building, I dissent.

The evidence shows the building was rented for a printing office and that the interior had to be changed and rearranged to make it suitable for that purpose. Mr. George knew of this, and was shown the changes that would have to be made in execution of the lease and consented thereto. It was not the agreement nor the intention of the parties that the tenant should replace these changes at the termination of the lease and put the building back as it was before the lease was executed. If it had been, the lease would have specifically so provided. The clause that the premises should be surrendered at the termination of the lease in as good condition as when taken, except as to ordinary wear and tear, relates to its use with these physical changes made by the tenant. I fear that branch of the case relating to damages to the building was tried to the court and submitted to the jury on the erroneous theory that it was the duty of the tenant at the termination of the lease to restore the interior of the building, or put it back in the condition it was in when the lease was executed. This being the case, I concur in the opinion that the judgment for the rent should be affirmed; but I think that branch of the case relating to the damages to the building should be reversed, and the cause remanded for a new trial.

Decided October 8th, A. D. 1917. Rehearing denied April 1, A. D. 1918.

No. 9083.

CAPP *v.* THE PEOPLE EX REL.

1. EVIDENCE—*Judicial Notice*, taken that the term of a former appointee to public office has expired.
   Not taken of the Journals of the General Assembly.
2. STATUTES—*Legislative Journals*, will not be considered in the construction of a statute unless pleaded and proved.
3. —— *Construction—Clerical Errors.* The courts have power to correct manifest errors in a statute in order to give the enactment its evident meaning.

Inasmuch as the proviso to sec. 26 of c. 51 of the Laws of 1915, read literally, is without meaning, the section numbered "2" in the statute is to be read "11."

4. CIVIL SERVICE—*Warden of Penitentiary.* Under c. 51 of the Acts of 1915 the office of warden of the penitentiary is not in the classified service. The Governor has power to remove the incumbent, without consent of the Civil Service Commission.
5. —— *Appointment to Office—Legality—Who May Question.* One wrongfully holding a public office will not be heard to object that the one contesting his right was appointed for an excessive term.
6. ABATEMENT—*Prior Action Pending*, is no plea where the first action is discontinued before the trial of the second.
7. QUO WARRANTO—*Salary of the Office.* The right to the official salary is to be determined in other proceedings.

Error to Chaffee District Court, Hon. James L. Cooper, Judge.

En Banc.

Mr. G. K. HARTENSTEIN and Mr. HARRY L. MCGINNIS, for plaintiff in error.

Mr. GILBERT A. WALKER and Mr. FRANK SWANCARA, for defendant in error.

Opinion by Mr. Justice Teller.

THIS is an action under Chapter 27 of the Code to try the right of plaintiff in error to the office of Warden of the State Reformatory at Buena Vista.

The complaint alleged that on the 27th of June, 1916, Governor Carlson, after a hearing duly had upon charges theretofore filed, removed said Capp from said office and

appointed and commissioned one R. L. Shaw thereto; that Shaw thereafter filed with the Secretary of State his oath of office and bond as such warden of said reformatory; and that said Capp was unlawfully holding said office. There was a second cause of action stated, to which a demurrer was interposed and sustained. A demurrer to the first cause of action alleged that the said office was under the protection of the Civil Service Law, and that the appointment of Shaw was void because not made by and with the consent of the Senate.

This demurrer was overruled, and the respondent filed an answer denying the right of the Governor to remove him, and asserting the invalidity of Shaw's appointment.

The answer also alleged that there was another action pending for the same cause of action, and that the respondent was appointed to said office upon a competitive examination under the Civil Service Law, etc.; that said appointment was made prior to the enactment of the Civil Service Law of 1916, under the provisions of which said office was continued under the protection of said law, because of which fact an incumbent of said office can be removed only by the Civil Service Commission.

On the trial of the issues thus raised, the court found for the relator, and entered judgment of ouster against Capp, and adjudged Shaw to have been entitled to said office since July 3, 1916.

The question whether or not the office is within the classified service under Chapter 51 of the Laws of 1915 depends upon the construction placed upon Section 26 thereof. It provides:

"That nothing in this act shall be construed to remove from the protection of the civil service any officer or employee in the service of the state at the time this act shall become effective, and who shall have previously been appointed to his present position as the result of a competitive examination, unless such officer or employee be holding a position which is exempt from the classified civil service by Section 2 of this act."

Said Section 2 provides for the appointment of a Civil Service Commission, their tenure of office, etc., but makes no mention of exemptions from the classified service. Section 11 provides that all appointive officers and employees shall be included in the classified service, except a considerable number of officers therein specified. Plaintiff in error relies upon a literal reading of the statute, while defendant in error insists that it is plain from the whole act that section 11 was intended when section 2 was named in section 26.

It is contended that the journals of the House and the Senate show that the act is identical with the bill as it appeared in its various stages through the Assembly; but that fact does not appear in the record, and hence it is not before us. It is not incumbent on us to consider it unless the fact has been pleaded and established by evidence. *People v. Ramer*, 61 Colo. 422, 158 Pac. 146; *Harrison v. The People*, 57 Colo. 137, 140 Pac. 203.

To construe the statute as it reads is to render the proviso in section 26 meaningless, while a consideration of the act as a whole readily suggests that a mistake was made, the Arabic numeral 11 being taken to be the Roman characters (II) for the numeral 2.

The power of courts to correct evident errors in words or figures so as to give to an act its manifest meaning is well settled. 36 Cyc. 1126; End. Interp. Stats. 309; Suth. Stat. Const. Sec. 260. In *State v. Cross*, 44 W. Va. 315, 29 S. E. 527, an act amending section 2 of a chapter of the Code was held from the context to mean section 11, precisely as it is contended should be done in this case. Thus read, the law gives effect to the plain intent of the legislature, and it should, therefore, be so read.

We are of the opinion, therefore, that the office is not within the classified service under the act of 1915, and consequently the Governor had power to remove the incumbent without the consent of the Civil Service Commission.

No fault is found with the order of removal, or with the proceedings leading up to it, and it follows that plaintiff in error was not entitled to the office when this action was begun, or on October 10, 1916, the date of the judgment of ouster. That being so, it is no concern of his that Shaw was appointed for a term of two years, instead of until the next meeting of the Senate, according to the provisions of the Constitution.

We find no error in the court's overruling the plea of another suit pending, since said suit was dismissed before the second suit was tried. 1 C. J. §132, p. 94.

It is further contended by the plaintiff in error that the evidence to show that Shaw had qualified and was entitled to the possession of the office was wholly insufficient, and that for that reason so much of the judgment as adjudged him entitled to the possession of the office should be reversed.

This court takes judicial notice that the term of office for which Shaw claims to have been appointed has long since expired. It is therefore unnecessary for us to consider this last mentioned contention, and we express no opinion upon it. *People ex rel. v. Hall,* 45 Colo. 303, 100 Pac. 1129.

So much of the judgment as holds that the plaintiff in error was not entitled to the office is affirmed; and the judgment modified to the extent that all matters relating to the right to the salary of the office, as between the plaintiff in error and Shaw, may be determined in a proper proceeding, as the parties may be advised.

The former opinion is withdrawn, and the judgment modified and affirmed.

Judgment Modified and Affirmed.

Decided October 3, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8578.

DAVIS *v.* DAVIS.

1. WILLS—*Contest—Undue Influence—Evidence.* Only general rules can be prescribed as to the character and amount of evidence to establish undue influence. The evidence need not, nor can be, of the direct and positive character required to establish a physical fact. Circumstances from which undue influence may reasonably inferred suffice.

Every favorable inference, fairly deducible from the facts shown, must be considered as facts proved in favor of the contestant.

If several inferences may reasonably be made, the one most favorable to the contest must be accepted.

That the distribution of the testator's estate is contrary to natural justice, may, with other facts, be considered; but that the will is not such as the jury or the court would have made, is not sufficient to deny it probate.

It is not for the jury to determine whether the will is a just and proper distribution of the testator's estate.

The evidence examined and held to warrant the verdict of the jury in favor of the contestant.

2. —— *Probate—Questions for the Jury.* The effect of intemperance in the use of intoxicating liquors is for the jury.

3. —— *Verdict—Effect.* The verdict of a jury is of special importance, and should not be disregarded except for grave reasons clearly apparent.

4. —— *Trial Judge—Approval of Verdict.* That the trial judge has refused to disturb the verdict is entitled to consideration upon error brought.

5. —— *Attesting Witness,* may testify in favor of those contesting the probate of the will. The credit to be awarded to his testimony is for the jury.

6. —— *Habitual Intemperance.* Instruction as to the effect of, and the duty of the jury in considering the evidence, approved.

Error to Weld County District Court, Hon. Neil F. Graham, Judge.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY and Mr. W. T. ROGERS, for plaintiff in error.

Mr. JOSEPH C. EWING, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

ON the 23rd day of July, 1914, an instrument purporting to be the last will and testament of W. A. Davis was presented to the County Court of Weld County for probate. On the 15th day of August, 1914, a caveat was filed by John A. Davis, son and heir of W. A. Davis, objecting to its probate.

The case was tried in the County Court before a jury, and verdict and judgment rendered denying probate of the will. Appeal was taken from this judgment to the District Court of Weld County and the case was again tried before a jury, where verdict and judgment was rendered denying the probate of the will, and from which judgment the case is before us on writ of error for review. The will is as follows:

"I give to my boy, John Davis, of Fort Lupton, Colorado, ten dollars.

I give to my son, Moses, 125 shares of the capital stock of The Ione Investment Company.

I give to my daughter, Anna, 60 shares of the capital stock of the Ione Investment Company.

I give to my daughter, Nellie E., 55 shares of the capital stock of The Ione Investment Company.

I hereby appoint my son, Moses, executor of this, my last will and testament, and request that he be allowed to serve without bond."

The will was attested by Edith Thomas, Edwin W. Knowles and John T. Jacobs.

There were two grounds of protest, undue influence and mental incapacity, which latter included the specific allegation of an insane delusion on the part of the maker of the will, at the time of the execution thereof, to the effect that John A. Davis was not his son. It was charged in substance that the testator had for some years indulged in the excessive use of drugs and alcoholic liquors to the extent that his mind and body were diseased, so that he had lapses of memory, fits of unconsciousness and insane delusions; and for such reason he was unable to clearly discern and comprehend the objects of his bounty, on the date of

the making of the will. That his mind was so impaired at the time, and that he acted under an insane delusion that John A. Davis was not his son, and for such reason disinherited the latter. That testator executed the will under the undue influence of his children, Moses, Anna and Nellie. That these children induced and persuaded the testator to cut off the proponent from a share in the estate, and deceived and induced the testator to join with them in the organization of the corporation styled The Ione Investment Company, and, by such undue influence and deceit, caused the testator to convey his entire estate to the said company, and to give a large number of the shares in such corporation to the said three children, and to, by said purported will, bequeath all the remaining authorized shares in said corporation to the said three children.

The estate conveyed by the devisor to the corporation is estimated to have been of the value of $400,000. The organization of said corporation is alleged to be as of the same date of the will. The testator was approximately seventy years of age at the date of the will. He was married to the mother of his children in 1865, the couple living together until the date of her death, about forty-five years later. John was the eldest of the children, remained unmarried and lived at home until he was about thirty-five years of age. The decedent settled in Weld County when John was eighteen years old, purchased a farm, and by farming and stock raising accumulated his large fortune.

The three remaining children, Moses, Anna and Nellie, continued to live with the decedent, or at least on the farm, until the time of his death. There is no evidence of any family dissention until after the death of the mother.

John, the contestant, ceased to live at home when about thirty-five years of age, and the reason for this was his failing health, being afflicted with asthma and stomach trouble, as was his father. He visited at the home regularly, at least until after the death of his mother. While living at the home it appears that he devoted his time to his

father's interests, in the development and accumulation of the family inheritance.

The principal contention of plaintiffs in error is that the evidence is insufficient to sustain the verdict. The additional contention to be considered is as to alleged errors of law in instructions given and refused.

The testimony of Judge Jacobs, who drew and attested the will, forms the basis largely upon which the contestor relies. It will be observed that the will proper is contained in exactly ten lines, yet the discussion, consideration and draft occupied the entire office day, from nine o'clock in the morning until four o'clock in the afternoon.

Jacobs testified that he had been the friend and attorney of the testator for many years; that at the date of the will Davis was broken in health, and distressed in mind; that he had been in ill health for many years, suffering from asthma and stomach trouble; that his wife died about two years prior to the making of the will, and that while he had been a drinking man for some years, his wife's death was a great shock to him, and from that time on he drank heavily, which seemed to greatly affect him in body and mind. That at the time of the making of the will he was a broken down old man, was very frail, and had fainting spells. His physical and mental condition grew worse after the death of his wife. That on the day of the making of the will he broke down and cried many times. On that day Davis came to Jacobs' office about nine o'clock in the morning, and did not leave until about four o'clock in the afternoon.

Prior to the making of the will Jacobs had prepared articles of incorporation, at the behest of Davis and the three proponent children. These articles were filed on the 12th day of the month, and the organization completed on the 15th, the day the will was executed. Davis had conveyed all his property to this corporation. The authorized capital stock was four hundred shares, of a par value of $100 per share. So that the bequests were confined to shares of stock in this corporation. The testator and his

three children, Moses, Anna and Nellie, were the only persons interested in the corporation.

On the day of the execution of the will the following shares were issued: To Moses Davis, 80 shares; to Anna Davis, 40 shares, and to Nellie Davis, 40 shares. It does not appear from the record that the remaining 240 shares were ever issued to the testator, although he attempts to bequeath them by the will to the three children.

The circumstances surrounding the making of the will are detailed by Jacobs in brief and in substance as follows:

That he asked Davis how he wanted the will drawn, and he replied, "Mose wants to control the estate, and we will give him shares enough in the corporation." Two hundred and forty shares then remained for disposition. He said, "We will give Mose control, and divide the rest between Anna and Nellie, giving Anna a shade the best of it, and give John five dollars." Afterward saying he would give John ten dollars. That he then drew a rough draft of the will, in which was written, "I give to my son, John, ten dollars." When I read that to him he became very much excited, got up out of the chair, came in front of my desk and said, "Take that word son out of there." I insisted that he should be properly identified, as there might be others of the same name. He commenced to cry and became much more excited and said, "You can allude to Mose as my son, and Anna and Nellie as my daughters, but don't allude to John as my son, because he is not my son, and I am not his father." He kept on crying, and I kept arguing with him. He finally sat down in the chair and continued to reiterate that John was not his son. I asked him as to how I should allude to John. He finally said that in the South they allude to the negroes around the plantation as the master's boys, as "my boys." He said you can allude to John as "My boy, John," but it must be in that Southern sense, and that he would never consent to the use of the word "son."

The witness then drew a line through the word "son" and substituted the word "boy." That in the draft he had named Moses and Anna as joint executors; that the testator

then told him to take that out, that "Mose wants to control alone, and it won't do, it won't suit him, and will make trouble." He said, "I will make it up by giving Anna money; I can always keep her quiet with money."

The witness testifies that he argued with the testator, and urged that he ought at least to give John a few thousand dollars. He said not more than ten dollars, and repeated, "I am not his father."

Witness thought he had reference to some unnatural or unkind conduct on the part of John, and said, "Of course he is your son," but the testator said, "No, some other man must be his father than me. Since his mother died I have thought about it all the time. He is so different from me, and it must be some other man is his father." The witness then testifies as to how he undertook to argue with the testator, and to dispel the thought by presenting to him the fact of the goodness of his wife, and her faithful devotion for many years; how John and he were both alike, afflicted with asthma and stomach trouble; how their inclinations and tastes were alike; how both were interested in stock; how both were close and careful with money. All of which testator admitted, and declared he had no reason for thinking otherwise, but said, "We are so different, and I have been thinking and thinking about it." Witness testifies that the old man was, during these discussions, abject, excited, pitiful, and was weeping.

Witness finally gave up his efforts to convince the old man of his error as to the legitimacy of his son. These discussions seem, according to the witness, to have continued throughout the day. The testimony is given at great length, and contains many statements and expressions of the testator of the same general import. The witness testifies that on the particular day, the testator had been drinking, but was not drunk.

The testimony of this witness itself is sufficient to take the case to the jury upon the questions involved; undue influence and mental incapacity, which includes the question of insane delusion. From this the jury was justified in

concluding that at the date of the will, the decent was old, that he was broken down in health, afflicted with asthma and stomach trouble, and had been so afflicted for a long time. That these disabilities had become intensified by reason of the death of his wife, occurring about two years before; that he had been given to strong drink for years, and this habit grew upon him after the wife's death.

The testimony also presents strong circumstances tending to show undue influence exercised by his three children, Moses, Anna and Nellie, with whom he lived, as relates to the disposition of his property; and if it otherwise appears that there was no rational ground upon which he could conclude that John was not his son, then it proves an insane delusion upon his part, from which the jury may have justly inferred the action of disinheritance.

The circumstances of the change of the word "son" to "boy" as testified to by Jacobs, is corroborated by the stenographer in his office, to the extent that she made two drafts of the will as stated by Jacobs. But the strong corroboration is the will itself. Its very language is confirmatory of the testimony. "I give to my boy John," "I give to my son Mose." It is not probable that an experienced lawyer would so draft such a document of his own volition; that he would so refer to the decedent's children, one as "my boy," and the others as "my son," and "my daughters."

It is not even contended that there is the slightest basis in fact for the statement and contention of the decedent, that John was not his child. That John was the son of deceased, born in lawful wedlock, and that the mother was a chaste and pure woman, is admitted in the pleadings. Beside, all the testimony in the case shows that the father so recognized and treated him up to the time of the death of his mother.

In addition to this there is the undisputed fact of their living together as husband and wife for forty-five years, the rearing of other children, and the testator's great grief at her death.

Under this state of facts the jury was justified in finding that there was no rational basis for the declarations of Davis that John was not his own child, and that these declarations were the result of an insane delusion. Indeed, there does not appear to have been any circumstances or occurrences as between the testator and his son John, that to a rational mind would in any sense serve as a reason for disinheritance. John lived with and assisted the father on the farm until he was thirty-five years of age. Certainly this was sufficient in length of time to constitute a fulfillment of filial duty in that regard.

But it clearly appears that when he did undertake to do for himself, he was so afflicted, and ill, as to be no longer able to continue the kind of work demanded on the farm, and such physical condition has ever since continued. There is positive testimony that he was economical, and not the slightest evidence that he was in any way dissipated, or not possessed of good morals, or not affectionate, or not kind to his father. It does appear in a remote way that his father was not pleased with his keeping race horses, but this is trivial. The only difference appearing as between father and son was some dispute as to the settlement of the mother's estate, which was adjusted between them. A search of the record does not disclose anything indicating other than affection between them, until after the death of the mother, when testator came under the exclusive family association and influence of the other children.

That decedent was afflicted as detailed in the quoted testimony, is nowhere denied. There is ample testimony aside from that of Jacobs, that he drank to excess, even to the extent of helpless intoxication.

Indeed, it appears that Davis had executed a will some months prior to the one involved, and was afterward persuaded by Jacobs, and perhaps others, to destroy it because of his intoxication at the time of its execution, and its possible invalidity for that reason. It is true that there is conflicting testimony as to Davis' drink habits, but that fact and the resulting effects on his mind and body,

if any, were questions for the jury. As to the weakened mental, and physical condition of the decedent subsequent to the death of his wife, there is strong corroborative testimony:

B. E. Landis, a farmer and neighbor of the decedent testified in part as follows:

"Q. Do you remember when Mrs. Davis died? A. Yes, sir.

"Q. About when was that? A. In 1909, right around Christmas, I think.

Q. Did you see Mr. Davis after she died? A. Yes, sir.

Q. State what effect you noticed on Mr. Davis after his wife died. A. Well, it seemed to affect him like everything. He simply went to pieces. He has told me, 'I don't feel like the same man since my wife died; nothing seems right to me.' He said that several times to me, and in fact it appeared as if he didn't seem right in doing business with him and everything.

Q. How is that? A. He didn't appear to act right afterwards as he did before.

Q. What did you notice about him that was not right? A. Well, one thing I don't know whether it was affected by his wife or the death of his wife, he went to drinking quite recently afterwards, and he didn't seem to talk right at all and do business right with me afterwards.

Q. Go ahead. What were the things you noticed about his actions that showed he was different. A. Well, he appeared to be childish as we call it, second childhood. His age was affecting his mind or something. He didn't seem to act right or talk right. I never asked any questions of any kind about his family affairs, but simply he told me these things. He never mentioned any one of the family but Mosey to me, but not to say anything to Mosey. He seemed to be in fear of Mosey, so he talked. He never said he was, but he just says, 'Don't say anything to Mosey.' He would generally give me pretty good weight and throw in a little. I never asked him to, but he simply done it of his own will. He says, 'Say nothing to Mosey.' He says,

'This is my affair.' He says, 'I have my own business but Mosey is running the business.' He seemed to be in fear of Mosey, that he would have trouble with him. He says, 'I don't want to have any trouble with my children.'

Q. Did he cry? A. Yes, sir, several times when he spoke about his wife's death he commenced crying and he said nothing seemed right since his wife's death. He would simply cry like a child when he would be alone somewheres.

Q. You spoke about the old gentleman drinking more heavily after his wife's death. Did you ever see him much intoxicated? A. After his wife's death I did, yes, sir, quite a number of times.

Q. State some of the circumstances. State what you saw, Mr. Landis. A. Well, I simply saw him dead drunk several times, what I call that.

Q. What do you mean by dead drunk? A. Simply didn't know anything, just helpless. The last time I saw him drunk was coming home from Greeley, he was on the train and the conductor had a hard time keeping him on the train every station they stopped at. He was terribly drunk that day.

Q. Did he ever get down on the ground or on the floor? A. I have seen him full more than once.

Q. How is that? A. I have seen him full more than once, that is, down and I would help him up and he would walk alright for a little piece and stagger around."

George J. Smith was a farmer, neighbor and friend of the decedent, both were born in the same neighborhood in Wales. Smith testifies as to occurrences when both were calling upon another neighbor, and testifies concerning Davis' state of mind at a time after the execution of the will, which at least has bearing upon the question of undue influence and the prior relationship of Davis and his son John:

"A. When I chastized Mr. Davis for cutting the one boy off, and I said if I had a dozen children I wouldn't do it, he put his hands over his face and said, 'O, Argyl,

what have I done. O, God, what have I done.' That is the expression Mr. Davis used.

Q. What is Argyl? That is the word for God in Welsh. A. Yes, sir.

Q. O, Argyl, what did I do? A. Why did I do it. Why did I do it. He made that expression right afterwards, or after he said, 'O, Argyl, what have I done! Why did I do it!' And he hid his face in his hands this way (indicating). That was prior to pulling the chair up to me and telling me that John was well provided for.

Q. Was? A. Would be well provided for and the stock was all in the name as it was issued and it was going to stay in his possession until he died. That is Mr. Davis' own words.

Q. When he put his hands over his face, what was his attitude? Was he calm or otherwise. A. No, sir.

Q. What was his attitude? A. He was crying, seemed to be in a tremor, his old frame was trembling and crying.

Q. Crying much or little? A. Well, sobbing and the words were coming between sobs.

Q. What was it he said about John being provided for? A. He said, 'John will be well provided for' when we were talking about the stock being issued to the three children, and it appeared it was the primary—or on the face of the whole transaction it appeared to the community, that it was done to cut John off from any inheritance, and when I explained it to Mr. Davis in that light and showed it to him, that is when he broke down, and then he said, 'My boy, the stock will stay in my possession until I die and John will be well provided for.' I didn't ask Mr. Davis for it. He just voluntarily told me, simply as a matter of friendship and of our long standing friendship.

Q. Do you remember when Mrs. Davis died? A. I think it was four years ago this coming January.

Q. Was there a change in the physical and mental condition of the testator after his wife's death? A. Why there was a notable change in Mr. Davis as a man. I don't know exactly to tell the condition. I didn't have a great

deal of business with him and all our visits that we had were entirely social, so that I wouldn't want to say about his mental condition without I had done business with him.

Q. State the facts. What did you notice? A. I knew Mr. Davis some time after Mrs. Davis died told me that when we were talking about the loss of a friend, or a dear one, a wife or a brother, somebody who was dear to us, and he said life didn't seem the same to him since Mrs. Davis died. Sometimes he would be out in the yard and he would want to ask mammy something, and he would go towards the house after she had died as though to put a question to her or ask her a question or get her advice, and probably by the time he would reach the room where he expected to find her, then he would recall she was not there, and he said that life didn't seem the same to him; on more than one occasion he told me of making these fool journeys as though he was going to speak to Mrs. Davis when he would realize she was dead.

Q. What, if anything, did the testator say to you about his son John's ability to work? A. He said the boy's affliction was inherited from his father, that is what I told you a while ago and he is not capable and he could not stand to do a hard day's work.

Q. Did he speak bitterly in any way about his son John? A. No, sir, he always called him 'my son Johnny,' or John or Johnnie. These terms he always used to me."

The record discloses that The Ione Investment Company to whom the decedent conveyed his property was incorporated on the 12th day of December, 1911. The articles were filed with the Clerk and Recorder of Weld county on December 15th, being the date of the will.

Stock certificates were issued on the same day as follows: Nellie Davis, 40 shares; Anna Davis, 40 shares; Moses Davis, 80 shares, and on the 10th day of February, 1913, certificates were further issued as follows: Annie Davis, 60 shares; Nellie Davis, 59 shares, and Moses Davis, 121 shares. This last issue was more than sixteen months prior to the death of the decedent, and made the total issue

to the three children of the 400,000 shares, authorized by the articles.

There is no record or positive evidence, that any stock certificates were issued to W. A. Davis. On each of the certificates last issued appear the following: "Not transable" till the place is sold, or otherwise to be agreeable to all." Presumably the word "transferable" was intended by "transable." The question arises as to why these certificates were issued prior to the death of W. A. Davis, if the persons to whom they were issued were relying on the will. For, on the face of the certificates, the entire capital stock of the company was issued to the three children by the two issues, one at the time of the will, and the other subsequent to its execution, and long prior to the death of W. A. Davis.

Was the jury justified in believing that the old man was induced to sign the latter certificates, while in the privacy of their home, under the belief that the words, "Not transable" till the place is sold or otherwise to be agreeable to all," would prevent the delivery of the certificates before his death, or "as otherwise agreed."

Could he have understood that this final issue of certificates exhausted the entire capital stock of the company, and without leaving him a single share, either in his name or that he might legally control.

So we have the amazing situation of the incorporation of a company, to which was conveyed all of decedent's property; certificates for 160 shares issued to the three of the children on the same day of the execution of the will, and on that day bequeathing the remaining unauthorized 240 shares to these same children, and later and before his death the issue of this 240 shares to the same children. This is unexplained by the record, and on the face of it, with attending circumstances, strongly indicates both undue influence and mental incapacity. This was evidence, with other facts and circumstances, tending to prove both mental incapacity and undue influence.

The rule quite applicable to this case as to proof of undue influence has been well stated by our court of appeals to be:

"The chief complaint and contention of the proponent is that the evidence presented and upon which the jury based its verdict sustaining the charge of undue influence was insufficient by reason of its lacking in that affirmative and positive character which is claimed to be necessary. It follows from the very nature of the thing that evidence to show undue influence must be largely in effect circumstantial. It is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy. He seldom uses brute force, or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precaution if he seeks by cajolery, flattery or other methods to obtain power and control over the will of another and direct it improperly to the accomplishment of the purpose which he desires. Subscribing witnesses are called to attest the execution of wills and testify as to the testamentary capacity of the testator and the circumstances attending the immediate execution of the instrument, but they are not called upon to testify as to the antecedent agencies by which the execution of the paper was secured, even if they had any knowledge of them which they seldom have. Only general rules concerning the amount and character of evidence required to establish undue influence in the execution of a will can be laid down. As to what is sufficient must depend upon the facts and circumstances of each particular case. These general rules have been stated and restated in many hundreds of different cases in the courts of every jurisdiction considered authority in this country. Different language is used by the different courts, but one main underlying principle, whatever phraseology is found in all, and that is, the evidence required to establish it need

not be—indeed cannot be—of that direct, affirmative and positive character which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonable inferred." *Blackman v. Edsall,* 17 Colo. App. 429, 68 Pac. 790.

Conceding the testimony in the case to be conflicting, the circumstances appearing are clearly sufficient to justify the court in submitting the case to the jury, and likewise under the well established rule in that respect, to require this court to decline to disturb the verdict.

In the consideration of this class of cases by courts of review, there are certain well established rules to be observed. Liberally as to the admission of testimony because of the recognized difficulty, if not impossibility of establishing either undue influence or mental incapacity by direct or positive evidence, such as is required to establish a tangible physical fact, and that the only positive and affirmative proof to be expected or required, is of facts and circumstances from which undue influence or mental incapacity, may be reasonably inferred.

Further, in determining whether or not a will contest should be submitted to the jury, every favorable influence fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts proved in favor of contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must for such purpose, be taken as true, and if contradictory evidence has been given, it must be disregarded.

If there is any substantial evidence tending to prove in favor of contestants, all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits. Further, that in this class of cases the verdict of the jury is of special importance and should not be disregarded, except for grave reasons clearly

apparent. This for the reason that a jury composed of the average men of the community sit together, consult, apply their separate experiences of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, and that they can draw wiser and safer conclusions from admitted facts, thus occurring, than a single judge. It has also been observed that in the consideration of such a case the jury not only saw the witnesses, noted their language, appearance and demeanor on the stand, but that they may have been acquainted with some of the witnesses, knew their relations, present and past, and any probable interest in aiding either party, or inclination to do so. And in case like the one before us, the jury was probably acquainted with the parties.

It has further been observed by the appellate courts of this state that the fact that the trial judge has refused to disturb the finding of the jury, is entitled to consideration. In the case at bar, it appears that two juries reached the same conclusion, and that the trial judge in each instance declined to disturb the finding of the jury.

It is vigorously contended by plaintiff in error that the testimony of Judge Jacobs, attesting witness, and who drew the will is not to be credited, and should be discarded by this court, for the reason that it is in conflict with his attestation. This is not the law and there is no authority to support it. It is true that in some cases judges have sharply censured attesting witnesses, who testified in opposition to the probate of a will, and perhaps with justification in the particular instances, but the record in this case does not justify such action. There does not appear to be any inducement, save that of duty and justice, tending in any sense to cause the witness to detail the facts and circumstances appearing from his testimony. He was called in the County Court by proponents, and in the District Court by the contestor. This question has been considered by this court, and it is held that this goes no further than to the question of credibility of the witness.

In the case of In Re Shapter's estate, 35 Colo. 579, 85 Pac. 691, 6 L. R. A. (N. S.) 82, 117 Am. St. 198, it was said:

"The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury."

The court correctly instructed the jury upon this point as follows:

"You are further instructed that the fact that persons identify themselves with the transaction as witnesses is an indication that in their opinion the person executing the instrument is competent to do so. The witnesses must be understood to attest not merely the act of the signing, but also the mental capacity of the testator at the time of the signing, and the fact of this attestation to the said will should be taken into consideration by you, together with all the evidence in the case, in determining whether or not the instrument presented before you is the last will and testament of W. A. Davis, deceased."

So that the jury had before it the apparent conflict in the testimony of the witness, and was instructed to take that fact into consideration.

The question of the credibility of the witness was for the exclusive consideration and determination of the jury, and in a case where the jury is duly cautioned as to the particular instance, as in this case, the finding upon that point will not be disturbed by this court.

Judge Jacobs testified that he did not want to sign the will as an attesting witness, but that the old man insisted that he do so. Further, that he was led to believe that no matter what was done, or what kind of an instrument was drawn, it would be of no importance, as the children, Nellie and Anna, purporting to speak for Moses also, had told him "that regardless of what kind of a will he made, their brother John was to have his share, and I should go on and do whatever he wanted me to do, and not bother him, and let him go ahead and do what he pleased, and after

he was dead they would give John his share, but go ahead and humor him and not cross him," so I felt what was done did not matter. That made me less careful than I would have been.

It is plain that Jacobs was a vitally important witness in the case and his testimony subjected to severe criticism throughout the trial, and in this court. The jury was cautioned by the court as to the peculiar circumstances under which his testimony was given.

We must assume that under this state of facts the jury acting within their province, gave credence to his evidence. The witness was not unknown to either court or jury; he had practiced law in the community for many years; had served as county judge in that county; had been the attorney and personal friend of the deceased for many years. A careful scrutiny of the testimony and of the record does not disclose the slightest indication of bias or prejudice on his part, for or against the parties.

Added to this is the circumstance that two courts and two juries have weighed this testimony, and have denied the probate of the will, also that the testimony of the witness given at the trial is not contradicted by other witnesses in any important particular. In the face of all these circumstances, for this court to deliberately set aside the findings of the jury because it may have been based largely upon the testimony of a particular witness, would be to overturn all precedent and to arbitrarily usurp a power which the court does not possess.

There was a sufficient number of attesting witnesses without Jacobs, which lends weight to his statement that he signed because of the insistance of the testator. The rule that an attorney drawing a will may properly testify, after the death of testator, has been asserted by this court. It was said in *In re Shapter's Estate, supra*:

"Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after

his death, and when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator."

A careful study of the instructions given, and of those tendered and refused, discloses no substantial error in that respect. Definitions and consideration of the law concerning what constitute undue influence and want of mental capacity, together with the rules of proof in such cases, have been made sufficiently clear by the decisions of this court and the Court of Appeals, as to make it entirely unnecessary to consider the decisions of other courts relating thereto. The court in this case has kept well within the law as so expounded, and the instructions seem to leave little or nothing for discussion.

It is urged that where a will is attacked on more than one ground and a verdict found for plaintiff generally, and it is impossible to tell on which ground the verdict is reached, such verdict should not stand, if any one of the grounds are insufficient.

It is not important in this case to enter upon a discussion of this question, nor to determine it, for the reason that we must hold that there is sufficient appearing upon each ground of the complaint to sustain the verdict, and that the grounds alleged are not inconsistent.

Counsel complain particularly of instruction No. 12, which declares:

"The court instructs the jury that drunkenness itself is a species of insanity, and may invalidate a will made during a drunken fit; and long continued habit of intemperance may gradually impair the mind and destroy its faculties, so as to produce insanity of another kind; drunkenness long continued, or much indulged in, may produce on some minds, and with some temperaments, permanent derangement and fixed insanity. Whether in this case intemperate habits or drunkenness on the part of the testator have

been proved, and whether his mind was thereby affected, and as to what extent, if any, are questions of fact to be determined by the jury, from a consideration of all the evidence."

The first phrase of this instruction might well have been omitted under the testimony, but when taken with the remainder of the instruction, and other instructions given, does not constitute prejudicial error.

There was no testimony in the case indicating that Davis was in a drunken fit at the time of the execution of the will. In fact Jacobs testifies that he was not drunk, though he had been drinking to some extent. It is not conceivable that the jury could have considered any other fact in that regard, than testator's intemperate habits as these may have impaired his mind.

Counsel further object to instruction No. 20, as follows:

"You are further instructed that in determining whether decedent was capable of disposing of his property by will, you may consider that in disposing of it the testator may have distributed it unequally to the natural objects of his bounty and has bestowed it in unequal proportions to the exclusion of some one or more of them. If the testator makes a will contrary to natural justice, this, with other facts, may be considered, but the mere fact that a will is not exactly according to what our conception of justice would be or that it is not such a will as you would make is not of itself sufficient to invalidate a will."

This instruction is sustained in *Lehman v. Lindermeyer*, 48 Colo. 305, 109 Pac. 956, and in *Nelson v. Nelson*, 27 Colo. App. 104, 146 Pac. 1079. But by instruction No. 5, the court further advised the jury upon this point:

"It is not the province of the jury to determine whether a will is a just, wise and proper disposition of the testator property. It is only their province to determine whether the paper presented is in fact the will of the testator, that is, that the instrument purporting to be a will was executed at a time when his mind had sufficient capacity to know and understand what disposition he wished to make

of his property and upon whom he desired to bestow his bounty, and was not under the constraint of undue influence whereby he was not acting as a free agent in the making of his will. The testator is under no legal obligation to dispose of his property by will as the law would dispose of it, by providing equally for his children. The very right to make a will implies and presupposes the making of a will and a disposition of his property in a manner different from that provided by law."

Finding no prejudicial error occurring upon the trial of the cause, the *judgment is affirmed.*

En Banc.

Mr. Justice Garrigues dissents.

Decided November 5, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8926.

LANDRUM ET AL., *v.* RAMER.

1. RECALL FROM OFFICE—*Protest—Duty of Secretary of State.* The Secretary of State is not under duty to immediately file in his office, a paper presented to him as a petition for an election to recall an officer.

It is his duty to examine what is presented, and determine whether it complies with the requirements of the constitutional amendment (Laws of 1913, 673 sec 2), and he is entitled to a reasonable time for such examination.

2. —— *Petition—When Filed.* A petition for the recall of an officer was presented to the Secretary of State, and was indorsed by him "Received for Consideration November 2, 1915," and was finally filed by him on the 12th. A protest was filed on the 27th of the same month. It was shown that at the presentation of the petition, it was agreed between the Secretary and those in charge of the petition, that the paper should not be filed until the Secretary had carefully examined it. The delay in the examination was sufficiently excused. *Held* that the petition was in fact filed on the 12th, and not on the 2d of November, and the protest was in time.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

En banc.

Mr. THOMAS WARD, JR., for plaintiffs in error.

Hon. FRED FARRAR, Attorney General; Mr. FRANCIS E. BOUCK, Deputy Attorney General, Messrs. JOHN F. MAIL and ALLEN & WEBSTER, for defendant in error.

Opinion by Mr. Justice Teller.

THIS cause is before us on error to a judgment of the District Court affirming the action of defendant in error, as Secretary of State, in holding insufficient a petition, filed with him for the recall of the judge of the Thirteenth Judicial District.

Under the constitutional amendment which provides for the recall of officers, a period of fifteen days after the filing of a recall petition is allowed for the filing of protests.

The protest in this case was filed on the 27th day of November, 1915, and plaintiffs in error insist that the petition was, in law, filed on the 2nd day of November; hence the protest came too late.

It is conceded that the defendant in error, the Secretary of State, gave to the parties who delivered the petition to him a receipt as follows: "Received for consideration on November 2nd, 1915"; and he alleged in his answer and testified that it was agreed between him and said parties that the petition would not be filed until he had carefully examined it. The testimony in this respect is fully corroborated. Evidence was introduced to show why so great a delay occurred in passing on the sufficiency of the petition preliminary to its filing.

The court found, as a fact, that the committee "acquiesced in the suggestion made by the Attorney General that the Secretary of State would receive it for examination and not at that time for filing"; also, that, under the testimony, the time consumed was reasonable.

The record contains nothing which justifies the reflections made by counsel for plaintiffs in error on the good

faith and fairness of the Secretary of State. He acted upon the advice of the Attorney General, and evidently tried to do his duty.

This finding that the petition was received by the officer for examination, and not for present filing, being fully supported by the evidence, is binding upon us. The parties having agreed that the petition should be filed when the officer had found it sufficient, cannot now be heard to say that it was, as a matter of law, filed when delivered.

This does not present the question which would have arisen had the committee delivered the petition *for filing* at that time. Here they delivered it for consideration, and to be filed subsequently if found entitled thereto.

Counsel for plaintiffs in error, however, insist that the question to be determined is: Was the petition filed on November 2, 1915, when delivered to the Secretary of State, or at the time the filing indorsement was placed thereon?

Opposing counsel have fully discussed that question, and in view of its importance, it ought, perhaps, to be determined, especially as it has been suggested that though the filing mark was not placed upon it until the 12th, the filing dated back, in legal effect, to the day on which the Secretary of State received the instrument.

The recall amendment provides that:

"All petitions shall be deemed and held to be sufficient if they appear to be signed by the requisite number of signers, and such signers shall be deemed and held to be qualified electors, unless a protest in writing under oath shall be filed in the office in which such petition has been filed, by some qualified elector, within fifteen days after such petition is filed, setting forth specifically the grounds of such protest * * *

"When such petition is sufficient, the officer, with whom such recall petition was filed, shall forthwith submit said petition, together with a certificate of its sufficiency to the Governor." Constitutional Amendment, Recall from Office, Session Laws, 1913, Section 2, pp. 673-674.

It is urged that a petition "should be filed when received, without an examination by the Secretary of State, or the person in whose office the petition for recall is filed."

This view was rejected by the trial court, and we think rightly so.

If counsel's contention is right, the officer has nothing to do but to receive the collection of papers bearing signatures, and file them as a recall petition. This is not consistent with the known purpose of the amendment, nor with its language.

It provides for a series of steps leading up to a recall election, and the first act which partakes of an official character is the filing of a recall petition in the office of the Secretary of State. The instrument to be filed is to be of the form and substance prescribed by the amendment, and nothing short of that is a petition with a right to be filed. Until there is such a petition, the movement for an election is not initiated.

The importance of this instrument is fully recognized in the amendment by the several provisions concerning it. The signers must be qualified electors; each one must add to his signature the date of signing and his place of residence, with street and number, if in town or city; and the genuineness of the signatures must be attested under oath by the circulator of the sheets for signature. The petition is to contain a statement of the grounds of recall, in not more than two hundred words, and must be signed by electors in number equal to one quarter of the vote cast at the last preceding election. Each section of the petition must contain its full title and text.

In the light of these facts, how can it be supposed that the officer, to whom certain official duties are committed by the filing of a petition, has no right to determine whether or not the papers filed, in fact, constitute a petition?

If he must accept and act upon a collection of sheets which *appear* to be a petition, though not in fact a petition within the definition of the amendment, all these specifications, which constitute such definition, are of no effect.

On that postulate, a collection of sheets with numerous signatures being filed, and no protest made, the Secretary of State in due time certifies them to the governor, and an election is called and held on a so-called petition which may not comply with the most important provision of the law.

The tax payers of the state, or a district, are burdened with the cost of an election on the petition of a far smaller number of signers than the people by this amendment decided should be required to set the recall machinery in motion.

This result is inevitable if the Secretary of State is a mere depositary of the papers alleged to be a petition. Unless some elector protests within fifteen days, the papers become in effect a petition no matter how defective in form or matter.

Such a construction should be adopted only upon the clearest necessity, and no such necessity exists.

The language of the amendment is not that all petitions shall be deemed sufficient if they *appear to be petitions,* but, if they appear to be signed by the requisite number of signers. A signature is not complete, and the writer of it not a "signer" in the sense of the amendment, unless there be added the date of signing and place of residence. Until it has been determined that the requisite number of persons have signed, and added to their signatures the matters required, and the verifying affidavits have been made, no one can say that there is a recall petition at all. These matters can be determined from the papers by inspection and computation; but the one important question which could not be so determined, to-wit: Whether or not the signers are qualified electors, need not be considered in the first instance; their qualification is presumed until a protest is filed. This is a reasonable and almost necessary provision, in order to make it possible to file a petition within a reasonable time after it is presented. There is no such reason for presuming correctness as to the matters which appear on the face of the papers, and

it is worthy of notice that there is but one of all the requirements to which this presumption attaches. Why does not the old maxim apply: *"Expressio unius est exclusio alterius"?*

The authorities cited on this point by the plaintiffs in error do not support the contention. They refer to the filing of bonds, etc., properly holding that an instrument which is received for filing is in law then filed although the filing marks are not put on until later. However, even in cases of ordinary instruments, in jurisdictions where only acknowledged or certified instruments are entitled to record, the officer receiving them must by examination determine whether or not they may be filed. A deposit with him is not a filing.

From the above consideration it results that the petition was not filed until November 12th and the protest was in time.

The judgment is therefore affirmed.

Judgment affirmed.

Mr. Justice White dissents.

Chief Justice Hill and Mr. Justice Scott not participating.

No. 8717.

WROUGHT IRON RANGE COMPANY *v.* ZEITZ.

1. MASTER AND SERVANT—*Master's Duty to Inspect Machinery.* The rule requiring the master to inspect the machinery used by the servant has no application to simple tools, the condition of which is as evident to the servant as to the master, e. g., an ordinary hammer which the servant provides for his own use.

2. ——*Order to Servant Construed.* An order as to a particular matter construed not to change the established method of work.

Error to Denver District Court, Hon. Geo. W. Allen, Judge. En banc.

Messrs. MILTON SMITH, CHARLES R. BROCK, W. H. FERGUSON, JOHN P. AKOLT, for plaintiff in error.

Messrs. WILLIAM H. DICKSON, CHARLES C. WELCH, FOREST L. NICOL, for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error obtained a judgment against the plaintiff in error for damages alleged to have resulted from its negligence. The parties will be designated as they were below.

The plaintiff, at the time of the accident, was about 17 years of age, and had been for some 22 months an apprentice of the defendant. While he was engaged in straightening the rim of a kettle, a piece of steel broke from a hammer which he was using, and pierced one of his eyeballs.

The case was tried, as the instructions show, upon the third cause of action. The negligence therein charged is, first, that the defendant negligently, through its foreman, informed the plaintiff that a hammer, furnished by plaintiff and given to the foreman for inspection, was proper and safe to be used by the plaintiff in the work assigned him, when, as a matter of fact, it was unsafe and unsuitable for such work; second, that the defendant, through its foreman, negligently and carelessly ordered and directed the plaintiff to lay aside a wooden hammer which he was using, and use in its place a steel hammer, thereby causing him to use one steel hammer against another, in the straightening of the rim or edge of a certain pot or kettle.

It is alleged that the chipping of the hammer was due to the use of the two hammers, as above stated.

The court gave the jury the following instructions:

"1. The plaintiff by the third cause of action of his amended complaint charges that he lost his left eye and was seriously and permanently injured while in the employ of the defendant, through the negligence of the defendant in the following particulars:

First: That the defendant negligently and carelessly, by and through its foreman, informed the plaintiff that the hammer furnished by the plaintiff and given to the said

foreman for inspection was a proper, safe and suitable hammer to be used by the plaintiff in the work assigned him by the defendant, when as a matter of fact said hammer was unsafe, improper and unsuitable for such work.

Second: That the defendant through its foreman negligently and carelessly ordered and directed the plaintiff to lay aside the wooden hammer which he was using in his left hand and to use in place thereof a steel hammer, thereby using one steel hammer against another, in the straightening of the copper rim or edge of a certain pot or kettle.

These in brief are the items of negligence specified and it is necessary for you to find one or both of them existed, and was the proximate cause of the injury to the plaintiff, before you can render a verdict for the plaintiff."

The verdict is general, and it is impossible to say upon which of the two negligent acts charged it was based. Hence, unless it appears that a right of recovery on both grounds was established, the judgment cannot stand.

The first ground is that the defendant was negligent in the approval of a defective hammer, such approval having been made by its foreman, it being assumed that the defendant owed that duty to plaintiff.

The question whether or not the foreman was a vice principal, though argued at length, need not be determined, because we are of the opinion, on both reason and authority, that the defendant was under no duty to inspect the plaintiff's hammer.

It has many times been held that the duty of inspection of machinery which a master owes to his employee applies only to those instrumentalities which are of such character as to prevent a ready recognition of inherent dangers, or defects, and does not apply to such simple tools as hammers, axes, saws, etc., the condition of which is as evident to the servant as to the master. *Ill. Steel Co. v. Mann*, 170 Ill., 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. 370; *Meader v. L. S. & M. S. Ry. Co.*, 138 Ind. 290; 37 N. E. 721, 46 Am. St. 384; *Marsh v. Chickering*, 101 N. Y.

396, 5 N. E. 56; Thompson on Negligence, Vol. 4, § 4707 and 4708.

In *Webster Mfg. Co. v. Nisbett,* 205 Ill. 273, 68 N. E. 936, it was held that a servant, injured by using a defective hammer, has no claim on his employer by reason thereof, although the latter knew of the defect, and had promised to remedy it. In *Lynn v. Glucose Co.,* 128 Iowa 501, 104 N. W. 577, it was held that the master owed a duty to his employes to look out for their safety in respect only to machinery and appliances which are recognized as in their nature dangerous to those using them, and that a hammer was not such an instrument.

Koschman v. Ash, 97 Minn, 312, 108 N. W. 514, 110 Am. St. 372; *Dompier v. Lewis,* 131 Mich. 144, 91 N. W. 152, and *Golden v. Ellis,* 104 Me. 177, 71 Atl. 649, all involving injuries from the use of hammers, are to the same effect. In Labatt's Master and Servant, in the notes to § 924a, the author has collected a large number of cases holding simple tools not to come within the reason of the rule which requires inspection of tools and appliances.

The distinction above suggested does not appear to have received serious attention in the cases cited to the contrary by the defendant in error, and in some of them it is not even noticed. In each of those cases the tool was furnished by the master.

In this case we are not called upon to go farther than to hold that a master is under no duty to inspect an ordinary hammer which the servant provides for his own use.

As to the second ground of negligence, it is to be noted that there is no evidence that the defective hammer was ever approved for use with another steel hammer. The plaintiff testified that, when he came into the shop, he was told to use a hammer and a wooden mallet, and did so for 22 months.

The approval of the hammer, even if that were the act of a vice principal in the discharge of a duty to plaintiff, did not cover its use with another hammer. It is not shown that the order, given two days before the accident,

to use two steel hammers, was made with knowledge that the plaintiff was then using the defective hammer. Neither does it appear that it was a continuing order. The plaintiff testified that "two or three days before the accident the foreman came along and said I could not make a job that way—I would have to use two steel hammers to make a job out of it." He was then using a hammer, and a mallet, as he was told to do on beginning his apprenticeship, and as he had done ever since that time.

The statement that "he could not make a job out of it," shows clearly that the order related to the particular job upon which plaintiff was then employed. That kettle may have presented some difficulty in its repair by the use of a mallet and a hammer which justified the order, but in the absence of any other evidence it is altogether unlikely that the order changed the established method of doing work of that kind.

Since the judgment must be reversed, it is unnecessary to discuss the other errors alleged. The judgment is reversed.

Judgment reversed.

Mr. Justice Allen not participating.

Decided December 3, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8720

WORTHINGTON *v.* KEELY.

1. APPEAL AND ERROR—*Extent of Review.* Action for contribution. The defendant instituted an equitable action to restrain the prosecution. An injunction allowed in this action was afterwards dissolved, and the action dismissed. The defendant in the original action afterwards filed new and additional pleadings therein. Judgment was given for the plaintiff. An exception had been taken to the interlocutory decree in the injunction suit, but no writ of error was sued out to review the final order. *Held* that upon error to the judgment in the original action in the proceedings in the defendant's action for an injunction were not reviewable.

2. —— *Presumptions.* Upon a general finding in the court below, conflicts in the testimony are resolved in favor of the defendant in errorr.
3. PRINCIPAL AND SURETY—*Co-sureties—Surety by Request.* That one becomes co-surety with another at the latter's request does not relieve him from liability to make contribution.
4. —— *Co-sureties—Contribution.* The right to contribution has its foundation in, and is controlled by principles of equity. It is not founded upon any express contract. One who has paid nothing upon a judgment recovered against him as surety is not entitled to contribution from a co-surety.

A bank had agreed to provide funds for a contractor upon certain public works. The contractor purchasing machinery for the work, plaintiff, an officer of the bank, the bank being incapable in law to become surety, became surety for the price of the machinery, and defendant, likewise, at plaintiff's request. Judgment was recovered against plaintiff and defendant for the price of the machinery, and the judgment having been satisfied, plaintiff sued for contribution. It appearing that the judgment was paid by the bank, and not by plaintiff, and the plaintiff was under no liability to the bank, *held* the action must fail.

Error to Denver District Court, Hon. John H. Denison, Judge.

Mr. THOMAS J. DIXON, and Mr. N. WALTER DIXON, for plaintiff in error.

Messrs. HUGHES & DORSEY, Mr. JOHN Z. DIER, and Mr. BERRIEN HUGHES, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

IN 1903, R. P. McDonald contracted with the city of Golden to construct for that city a waterworks system, or plant. This contract was assigned by McDonald to Thomas Keely, then vice-president of the First National Bank of Denver, with authority to collect the payments arising thereunder. This assignment was to protect the bank for moneys to be advanced by it to McDonald in the matter of construction.

Shortly after this assignment McDonald purchased a bill of materials to be used in the work of construction, from The Kansas City Bolt and Nut Company, and the

plaintiff and defendant in this case, guaranteed the purchase price of these materials. McDonald failed to make payment for the materials, and the Bolt and Nut Company brought suit in the United States District Court against the plaintiff and defendant jointly, as guarantors, for the amount due and unpaid on the purchase price.

Judgment was rendered against the guarantors, and upon appeal to the United States Circuit Court of Appeals, the judgment was sustained to the extent of $2,665.65, including interest and costs, which judgment was paid by the said First National Bank.

This suit was by Keely as against Worthington, his joint guarantor, for contribution to the extent of one-half of the sum so paid. Judgment was obtained against Worthington by default.

On the 18th day of November, 1908, Worthington filed a complaint in the District Court of the City and County of Denver, being the same court in which Keely had obtained the default judgment, and against Keely, alleging the matters above set forth, and that he was not served with summons in this suit, and had no knowledge of the pendency of the action until after Keely had commenced an action on the default judgment, in the Court of Common Pleas in the City of Cleveland, state of Ohio.

It was alleged also that the pretended service in this case was, as shown by the return, made by delivering to and leaving with M. H. Scott, the clerk or bookkeeper of John S. Worthington, the defendant, personally in the city and county of Denver, at the usual place of business of said Worthington, a true copy of the summons and complaint.

It was further alleged that the plaintiff left the state of Colorado on January, 1907, for the state of California and was continuously absent in said state, until April 6th, 1907, and that no member of plaintiff's family was within the state of Colorado during said period. The service in this suit purports to have been made on the 9th day of February, 1907, and the default judgment rendered on the 12th day of March, 1907.

It was alleged further, that the said M. H. Scott was employed by the plaintiff as stenographer, and that her sole duty during his absence was to receive and forward mail, and to answer such communications as she had been directed; that the summons in this case was never delivered to Worthington, and that he did not receive or have any knowledge of the same, until after the institution of the Ohio suit. That therefore, the court had no jurisdiction to enter the judgment and that the same is void. Further, that plaintiff had been advised and believed, that he had valid defense to this action.

Prayer in that suit was for vacation of the default judgment, and that Keely be enjoined from enforcing the same.

The court upon the hearing in that case entered an interlocutory degree, so styled, enjoining the enforcement of the default judgment, ordered a trial of this action on its merits, and directed the deposit of the sum of $1,700 by Worthington in the registry of the court, to abide the result of this trial. It was further ordered that a transcript of all the proceedings, upon the trial of this cause, be filed in that case, to the end that a final decree be entered in accordance with the result of the trial in this case. These orders were complied with, and afterward the injunction in that case was dissolved and the case dismissed.

Exceptions were taken to the interlocutory decree, but no writ of error was sued out in this court, and no other effort made to obtain a review of the proceedings therein.

In this case the defendant filed his answer, and the plaintiff replied. Trial was had on the merits of the case, and judgment rendered in favor of the plaintiff Keely. This action is to review such judgment.

The defendant in error contends for a review of the proceedings in the action of *Worthington v. Keely,* to set aside the default judgment. This must be denied. No cross errors are assigned, and the defendant in error accepted the result in that case by filing new and additional pleadings in this case, and proceeded upon the theory of a

trial upon the merits of the suit as originally instituted, and obtained judgment in his favor.

The complaint sets forth the contract by McDonald with the Bolt and Nut Company, and the guaranty thereof by Keely and Worthington, the payment by Keely of the judgment of the Federal Court rendered thereon, and the insolvency of McDonald. It contains no reference to the First National Bank, and is simply in the form of an action upon the part of Keely as against Worthington, for contribution under the contract of guaranty.

The defendant below relies upon the third and fourth defenses pleaded in the answer. In the third defense it is alleged that when the plaintiff Keely, signed the contract of guaranty, set up in the complaint, he had indemnified himself against loss by reason or on account thereof, by taking from said McDonald an assignment of all his rights to payments under the contract with the city of Golden, for the construction of the water plant, and also by an order from McDonald, directing all payments thereunder to plaintiff. That since the payment of said judgment, plaintiff has realized and collected from said city, a sum in excess of said judgment, in the sum of $4,000, and thereby reimbursed himself for all moneys paid on said judgment.

The fourth defense alleged in substance that the money with which the plaintiff paid the judgment, was furnished to plaintiff by the First National Bank, and at the time or thereafter, it was agreed between the bank, plaintiff and McDonald, that the bank should accept McDonald as its debtor for the money which the bank had furnished plaintiff with which to pay the judgment, and that plaintiff should be under no liability therefor to the bank. That the bank did so accept said McDonald as its debtor for said money so furnished, and accepted the promissory note of McDonald in payment therefor. It is denied that the plaintiff sustained any loss by reason of the premises, and for such reason denied that plaintiff is entitled to contribution from the defendant.

The replication admits that the money which went to

pay the judgment was furnished to plaintiff for that purpose by the bank, and alleges that:

"At all times in the complaint mentioned plaintiff was and still is an officer and representative, to-wit, the Vice-President, of said First National Bank of Denver, and that with reference to the transactions and occurrences alleged and referred to in the complaint, as well as such of the transactions and occurrences referred to in said fourth separate defense as are true, plaintiff was acting as such officer and representative of said Bank, as a trustee of an express trust for said Bank, for its benefit and on its behalf."

After the introduction of all the testimony, the defendant was permitted to amend his fourth defense to conform to the proof; in substance, and to the effect; that defendant denied that plaintiff paid and satisfied the judgment, and avers that it was paid by the bank on January 23rd, 1907, and that on January 24th, 1907, the bank took McDonald's note for the money which it had so paid, and denies that plaintiff is now or ever was under any liability to the bank because of its having paid the judgment, and denies that the plaintiff has sustained any loss or damage, or is entitled to contribution.

There is no material conflict in the testimony and whatever conflict there may be, must for the purpose of this case, resolved in favor of the defendant in error, because of the general finding of the court.

Keely testifies that he took the assignment of the city of Golden contract with McDonald, in his own name to protect the bank for advances to be made to McDonald in carrying on the work. That he signed the guaranty in question personally, for the reason that the bank could not lawfully make such a guaranty. That the bank paid the judgment rendered upon such guaranty, and that he is not and was not liable to the bank for the sum paid in satisfaction of such judgment; that this sum was included in a new note to the bank executed by McDonald, on the day following the payment of the judgment; that McDonald's

notes have since been charged off by the bank; that subsequent to the payment of the judgment, he received $3,800 from the city of Golden on the water works contract, and that this sum was credited to the bank's profit and loss account; that at the time McDonald was indebted to the bank on the notes theretofore charged off in a sum greatly in excess of $3,800.

Keely testifies that in all matters and things involved in this action he was acting for the bank, and that if he should collect the judgment in this case the money would belong to the bank. He says that the bank made no specific arrangements with him concerning the assignment to him of the water construction contract, or the guaranty to the Kansas City company. He says only that the bank passed a resolution twice each year in protection of its officers in the matter of obligations made by them for the benefit of the bank. We take it from this testimony that these resolutions were general in their nature without specific reference to any particular officer or transaction.

It is contended by plaintiff in error that Worthington is not liable for contribution upon the joint guaranty with Keely for the reason that Keely induced Worthington to sign the guaranty by assuring the latter that he, Keely, held an assignment of the city water works contract, and by means of this would protect Worthington from loss. This is denied by Keely, and the court found in his favor.

It has been held by this court that to relieve a party from liability to contribution there must be a contract express or implied for such immunity, and the mere fact that the defendant became surety at the plaintiff's request is not sufficient to release him from liability, though such a request is a good consideration for a promise of indemnity. *Chapell v. John,* 45 Colo. 45, 99 Pac. 44, 132 Am. St. 134, 16 Ann. Cas. 854.

It is further contended that there is a fatal variance between the complaint and the proof, in that the plaintiff alleged a cause of action in himself personally, and the proof shows that if any claim exists, it is upon the part

of the bank alone. In the complaint plaintiff alleges that he personally paid the judgment. In his replication he declares he was acting for the bank as the trustee of an express trust. But the testimony shows no specific authority to so act.

Keely expressly says that he signed the guaranty for himself, and not for the bank, and knew that the bank could not lawfully enter into such a contract. He does not contend that in any of the transactions involved, there was any contract relations between himself and the bank concerning these matters, other than that he was an officer of the corporation.

The rule of law in this respect is well stated by Mr. Pomeroy in his work on Remedies and Remedial Rights, § 17, to be:

"It is abundantly settled that an agent cannot sue in his own name to enforce an implied liability to his principal; if by any possibility he should be a trustee under these circumstances, he would not be the trustee of an express trust."

This is not a suit upon the contract of guaranty, nor upon a contract at all. The right to contribution has its foundation in and is controlled by principles of equity and material justice and does not arise from contracts. 9 Cyc. 794.

Keely cannot maintain the suit for himself, for he says he did not pay the judgment and is in no way liable for the payment that was made; that the bank paid it, and it was the bank's affair. He cannot maintain an action in his own name for contribution in favor of the bank and in which he has no sueable interest, merely because of the fact that he is an officer of the bank. And if we were to admit for the purpose of argument that Keely in signing the contract of guaranty acted as the trustee of an express trust, the fact still remains that the contract was fully satisfied and discharged by the judgment and its payment.

A suit for contribution is an original action, as in assumpsit, or in equity, and not upon contract, and must

therefore be brought in the name of the real party in interest. 9 Cyc. 801, 6 R. C. L. 1059.

Contribution presumes the payment and extinguishment of the debt by one co-security for the benefit of all. *Dillenbeck v. Dygert*, 97 N. Y. 303, 49 Am. Rep, 525. The very foundation of the doctrine of contribution is that one had paid more and another less than his share, and where such is not the fact the right does not exist. 6 R. C. L. 1043, 9 Cyc. 789.

Here the plaintiff paid nothing and testifies he is in no way liable for anything that was paid on the judgment, hence there exists no right of contribution in him.

Whether or not the First National Bank for any reason may claim contribution in a proper proceeding, is not properly before us, and is therefore not determined.

The judgment is reversed.

White, C. J., specially concurring.

En banc.

Chief Justice White specially concurring:

The instant case is a suit in equity, the purpose of which was to enjoin the enforcement of a judgment at law against Worthington in favor of Keely. The court held that while the judgment sought to be enjoined was not void, Worthington was, nevertheless, entitled to, and should be allowed to present his defense. The court required Worthington to deposit in the registry of the court the amount of the judgment, to abide the final disposition of the equity case, enjoined Keely from enforcing the judgment at law until there had been a trial on the merits of the defense, and ordered that upon the conclusion of such re-trial, all the pleadings therein, evidence preserved by bill of exceptions, and proceedings, be reported to and filed in the instant case, as a part of the record thereof; and retained jurisdiction of the cause, to the end that a final decree be entered. Those directions of the court were complied with and subsequently the decree here involved was entered. Under the circumstances, the rehearing was, in substantial effect, nothing more than the ascertainment of certain facts by a

referee, his finding thereon and a report to the chancellor, and is therefore properly in this record for review here.

I am of the opinion that the record shows clearly that Keely was not entitled to any judgment against Worthington for the simple reason that he had paid nothing upon the joint obligation of the two entitling him to contribution. Furthermore, the National Bank discharged the obligation of its own volition, and exacted and received of the principal, for whom Keely and Worthington were sureties, his promissory note for the full amount thereof. Such bank had no legal capacity to become surety. It, however, did have legal capacity to loan money upon promissory notes, and when it paid a judgment against a principal and his sureties in a bond, and took the promissory note of the principal for the amount of such payment, it should be held that the one primarily responsible on the bond had discharged his debt. I am, therefore, of the opinion that the court erred in denying equitable relief, and that the cause should be re-instated and the collection of the judgment at law enjoined.

Decided December 3rd, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8873.

LOWE ET AL. *v.* HOWELL.

CONTRACTS—*Rescission.* One who would rescind a contract for fraud in procuring it must act with reasonable diligence. If for years after the discovery of the fraud he continues to treat as his own, the property the purchase of which was the subject matter of the contract, rescission will be denied.

Error to Denver District Court, Hon. Granby Hillyer, Judge.

Messrs. J. E. SIMONSON and W. G. SIMONSON, for plaintiffs in error.

Messrs. DOUD & FOWLER, and Mr. ERNEST B. FOWLER, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFFS in error were defendants below in an action in which defendant in error sought to enforce payment of a note given by E. E. Lowe for a balance due on the purchase price of certain land and water stock in Los Animas County, and to enforce a lien upon such water stock standing in the name of Edith G. Lowe, and deposited as collateral for the payment of such note. Answering the complaint defendants set up fraud and false representations in respect to the sale of the land and water rights, and asked for a rescission of the contract. At the conclusion of the testimony judgment was rendered for plaintiff, upon demurrer to the evidence. In this opinion the parties will be designated as in the court below.

It appears that in 1911, defendant E. E. Lowe, and one Adamson, purchased from plaintiff a desert claim of 320 acres in The Model Land & Irrigation Company project, together with 160 shares of water stock in that company, for $7,600.00. In May of the same year E. E. Lowe and his wife, Edith G. Lowe purchased another 320 acres, and another block of 160 shares of water stock. There were two notes given as part payment for the last purchase. The first note was paid by E. E. Lowe when due. Defendants contend that they were induced to buy the second tract by the representations of defendant that it was similar in every respect to the first one purchased, in regard to the water rights, and that the water represented by the 160 shares of stock was sufficient to water the entire acreage so sold, and to secure title from the government. They also allege that there were representations in regard to the character of the land, and the amount of water which could be obtained, all of which were false and untrue. In view, however, of the undisputed conditions presented, it will be unnecessary to pass upon the question whether the representations alleged to be false, were sufficient to avoid the contract.

In sustaining the demurer to the evidence the court did so on the ground that defendants failed to ask a rescis-

sion of the contract within a reasonable time, and that, by reason of such failure the plaintiff would necessarily be damaged, should a rescission be decreed. Defendants first discovered in 1912 what they believed to be evidence of the falsity of the representations made. At that time their counsel took up the matter of a rescission for consideration, but instead of beginning proceedings to that end, a compromise was suggested, and until this action was commenced in April, 1915, defendants treated the property as their own. A tenant was put into possession of the land under a lease agreement expiring in February, 1917. Also, when plaintiff's entry of the land as a desert claim had expired, defendants themselves filed upon it. Both of these acts were done long after the alleged falsity of representations by plaintiff were known to them. The first act of the defendants looking to a rescission of the contract was in filing an answer in this action wherein plaintiff sought to compel payment of the note for the balance of the purchase price of the land.

It is settled doctrine here that the party who seeks to rescind a contract must do so within a reasonable time after the discovery of the alleged fraud. After having elected to rescind the contract, he must consistently adhere to the choice of remedies. He cannot pursue a double course by attempting on the one hand to rescind, and on the other to still exercise dominion over the subject matter of the contract. The two remedies, one for damages and the other for rescission, for fraudulently inducing a contract are inconsistent, and the adoption of the one precludes a party from obtaining redress under the other.

Auld v. Travis, 5 Colo. App. 535, 39 Pac. 357; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. 483; *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462; *Reynolds v. Hart*, 42 Colo. 150, 94 Pac. 14; *Brown v. Gordon-Tiger Co.*, 44 Colo. 311, 97 Pac. 1042; *Central Life Assurance Society v. Mulford*, 45 Colo. 240, 100 Pac. 423; *Ponder v. Altura Farms Co.*, 57 Colo. 519, 143 Pac. 570; *Halm v. Wright*, 168 Pac. 36.

In *Halm v. Wright, supra,* the court, in discussing the rescission of a contract, said:

"The land was conveyed to defendants in February, 1910, and they went into possession the following month. They cultivated it and continued to live on the property and cultivate it until 1913, at the time the cross bill was filed. They were in possession for more than two years before the action was begun to foreclose, and not until the commencement of that suit did they in any way repudiate the contract of purchase and sale, or seek a rescission of it.

"It is axiomatic that the powers of a chancery court to rescind a contract on the ground of fraud cannot be exercised unless it be clearly established that the party seeking relief has been guilty of no laches after discovery of the fraud. * * * This rule is laid down in 6 R. C. L. 935, as follows: 'The right to elect to rescind a contract on the ground of fraud must be done promptly upon discovery of the fraud. If any act is done by the complaining party after discovering the alleged fraud towards perfecting or carrying out the contract it is an irrevocable election to abide by the contract.' "

From the record it is manifest that defendants were unmindful of their duty to act at once after discovering the alleged falsity of the representations as to the land and water rights. After such discovery they continued to treat the property as their own, and are now precluded, as matter of law, from asserting a right to rescind the contract. The judgment of the trial is therefore right and will be affirmed.

Judgment Affirmed.

Decision *en banc.*

Decided December 3, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8933.

GRANT ET AL. *v.* ELDER ET AL.

1. QUO WARRANTO—*Statute Construed.* The phrase "any franchise" in sec. 320 of the Code includes the powers and rights conferred upon a private corporation, and *quo warranto* lies to try the right of those lawfully elected directors of a private corporation and wrongfully prevented from acting.
2. EQUITY—*Jurisdiction.* Equity will not entertain a bill to examine the title of those claiming to be directors of a private corporation, unless there is some paramount equity involved, to which such title is merly incidental.
3. CORPORATIONS—*Election of Directors—Special Meeting.—Statute Construed.* Where the annual meeting of a private corporation for the election of directors is not held upon the day appointed by the by-laws, a special meeting for the election can be called only by the directors, or by two stockholders. (Rev. Stat. sec 867.) An election at a special meeting called by the president, under express authority of the by-laws, is void, unless every stock holder is present and consents to proceed to an election.
4. EQUITY—*Laches.* Bill to contest the election of directors of a mining corporation. The election was held in December, 1913. The action was instituted on December 20, 1913. It was not tried until January, 1916,—the delay being attributable to the plaintiffs. Considering the character of the corporate property, involving speculative values, the plaintiff's dilatory conduct was condemned as inexcusable laches.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. JOHN A. EWING, Mr. JOHN W. SLEEPER and Mr. FRAZER ARNOLD, for plaintiffs in error.

Mr. GEORGE R. ELDER and Mr. ROBERT DULL ELDER, for defendants in error.

Mr. Justice Garrigues delivered the opinion of the court.

Statement.

THIS suit, brought in equity by injunction, is to try the validity of a corporate election for directors of the Adams Mining Company, a domestic corporation. At the purported annual stockholders' meeting to elect directors,

held in Denver, December 18, 1913, the stockholders present divided into hostile camps known as the Elder and Sylvester factions, and each chose or attempted to choose a set of directors. Prior to this meeting Sylvester and his associates were in control for a number of years, and elected the board largely by obtaining and voting proxies at the annual stockholders' meetings, and they claimed the right at this meeting to vote by proxy some 99,000 shares. The Elder faction claimed more recent proxies for some of the same shares, revoking a sufficient number of Sylvester proxies, which, in connection with their personal holdings, gave them the right to vote 78,136 shares, or a controlling interest sufficient to elect the board; the capital stock being 150,000 shares. This suit is the outgrowth of what occurred at this meeting.

The by-laws provide that the annual stockholders' meeting to choose directors shall be held each year at the company's general office in Colorado, on the second Wednesday of December, which in 1913 was December 10. The annual meeting was not called for or held at that time. Prior to, and on the day fixed by the by-laws, when the meeting should have been held, the directors were Sylvester, Grant, Broemelsick, Ewing, Lauderman, Waters and Rule. Sylvester was president, and Rule was secretary. The company maintained general offices at suite No. 1030-35 First National Bank Building, Denver. Sylvester, as president, called the annual stockholders' meeting in 1913, to be held at this Denver office on Thursday, December 18, for the election of directors. When Elder and his following arrived at the pointed hour, and place of meeting fixed by the notice, Sylvester and his adherents were already there, and Sylvester, as president, at once called the meeting to order. The Elder faction claimed the right, on account of their proxies, to organize the meeting, which the opposition disputed. In attempting to organize, each faction nominated a temporary chairman, and the stockholders present voted, or attempted to vote, all the proxies they claimed, for one or the other of the nominees, and each

side contended that its chairman was elected. The president, acting as the presiding officer, declared the nominee of the Sylvester faction elected, and he took the chair, and presided over the meeting held at this office. As soon as a secretary was chosen, the Elder faction moved that three certain designated persons be chosen as a committee on proxies, which motion the chair declared premature and out of order. After the secretary read the president's call for the meeting, the Sylvester faction moved that the chair appoint a committee on credentials. The opposition moved a substitute that the three designated persons act as such committee. Both sides voted on this motion as far as they could, all the proxies they had, and the chairman declared the substituted motion lost, the original motion carried, and appointed all the committee from the Sylvester faction. The Elder faction appeared before this committee with the proxies they claimed. The committee found against them, and brought in a report seating the Sylvester proxies, and on motion the chairman declared the report adopted. The Elder faction then ceased trying to organize the meeting at this place, and moved an adjournment to 621 E. & C. Building, Denver, giving as the reason that their proxies were not seated. This motion was made, seconded, put and voted for, and declared carried, by the Elder faction, one of their number claiming to act as temporary chairman for that purpose. They immediately retired to 621 E. & C. Building. The stockholders remaining chose the old or 1912 board of directors, who re-elected the old officers. No change being made in the board or in the officers of the company.

The Elder faction organized immediately at the E. & C. building, and chose directors, which elected officers. This meeting adjourned at 3 o'clock p. m., and within thirty minutes this suit was begun by service of summons on Grant, Sylvester and Ewing, the others being non-residents of the state and not present, were not served, though named as defendants. Complaint was filed December 20, 1913. February 24, 1914, plaintiffs confessed a demurrer,

and filed an amended complaint. June 1, 1914, the amended complaint was stricken from the files on defendants' motion. June 19, 1914, the second amended complaint was stricken from the files on defendants' motion. February 3, 1915, permission was granted plaintiffs to refile their original complaint, to which a general demurrer was at first sustained, and then overruled.

The action as originally begun was to obtain injunctions against numerous and various defendants, but when the issues were finally settled and the case tried, all plaintiffs were dismissed except Elder, Allen, Mann and Malburn, as well as all defendants except Grant, Sylvester and Ewing. The cause was tried as an action in equity to determine whether plaintiffs had been chosen directors, and were prevented from exercising the right by the defendants, who claimed to be the directors. No injunction was asked for or granted, and all other issues were dismissed.

All the affairs, effects, business, management, property, books, and every corporate right and function of every kind and description, relating to the franchises, affairs and property of the corporation, remained wholly in the hands, control and possession of the Sylvester board, as theretofore, and it paid all taxes, and made all the annual reports required by law, and were generally recognized as representing the corporation, and as being in control and having the management of its effects and affairs. The Elder board made no attempt to interfere with such management and control, or to exercise any of the functions or franchises of the corporation. The president and secretary chosen by the Sylvester board called the 1914 annual stockholders' meeting at the company's office in Denver. The president and secretary chosen by the Elder board called a meeting to be held in Leadville; no meeting was organized there, however, for lack of a quorum. A large majority of the stockholders, either in person or by proxy, attended the meeting held in the company's general office in Denver and chose a board of directors, who remained in control

until the annual meeting in 1915. In 1915, practically the same process was repeated; that is, the president and secretary who were elected by the Elder board chosen in 1913 called the 1915 annual meeting at Leadville, but nothing was done for lack of a quorum. The president and secretary elected by the board chosen at Denver in 1914 called the 1915 annual stockholders' meeting at the company's office in Denver, at which a large majority of the stockholders were represented, either in person or by proxy, and again chose directors for the ensuing year. Before the trial of the case in January, 1916, annual stockholders' meetings had been duly called for 1914 and 1915 by the *de facto* officers at least, at which a large majority of the stockholders, either in person or by proxy, attended for that purpose, and chose directors. There is no dispute about the Sylvester adherents being largely in the ascendency and control in 1914 and 1915, and that the Elder faction were unable to obtain a quorum or hold a meeting in either of those years. The only question raised concerning the regularity of the stated or annual stockholder's meetings in 1914 and 1915 is, it is claimed, that they were not called by the authorized persons, namely, by the president and secretary elected by the Elder board chosen in 1913, or, stated another way, that they were not called by the president and secretary of the company. Defendants in error do not claim that they were re-elected or chosen directors in 1914 or 1915, or that they organized either of those meetings. They claim they were chosen directors at the annual stockholders' meeting held December 18, 1913, at the E. & C. Building, and there being no subsequent valid election, they hold over and are still directors. The court decided the dispute regarding the proxies in favor of the Elder faction, and found that at the stockholders' meeting called by the president for December 18, 1913, the Elder set of directors were duly chosen; that no directors have since been chosen to succeed them; that the survivors of the seven then chosen are still the lawful directors, with the exclusive right to direct the

management and affairs of the company until their successors are elected and qualified; that Elder was duly elected president, and Malburn secretary, by this board; that the Sylvester board have not been directors since December 18, 1913, and that the officers elected by it are not the officers of the company; that the annual stockholders' meetings called for 1914 and 1915, and held in Denver, were unauthorized, illegal and void, and entered a decree accordingly.

Opinion.

1. This action is to contest the election of a board of directors in a private corporation.

The first question presented is whether our *quo warranto* statute affords an appropriate remedy in such a case. If it does, it is exclusive of all other remedies. The Code, section 320, R. S. 1908, provides:

"An action may be brought by the district attorney in the name of the people of this state, upon his own information, or upon the relation and complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the state, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held, or exercised by any person, or when he is directed to do so by the Governor; and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party, upon his own relation, in the name of the people of the state."

It is claimed by defendants in error that the *quo warranto* statute does not apply, and there being no specific statute to try a contested election over the board of directors of a private corporation, that equity affords a proper remedy. This claim is based upon the alleged ground that they have no other plain, speedy and adequate remedy. If

they have, then there is nothing upon which to base an equitable action.

Defendants below, plaintiffs in error here, were directors prior to December 18, 1913, and claimed on the trial that there was no election that year and that they were hold-over directors. Plaintiffs below, defendants in error, claimed they were elected directors December 18, 1913, and that defendants thereafter, though they had no lawful claim to the directorship, were wrongfully claiming to be directors, and acting as such against the rights of plaintiffs, who were the lawful directors.

We have no statute giving an equitable action or any specific proceeding to try the validity of a contested corporate election, except it be *quo warranto*. This section, omitting parts immaterial to this controversy, provides that the district attorney, in the name of the people, upon his own information, or upon the relation and complaint of a private party, may bring an action against any person who usurps, intrudes into, or unlawfully holds or exercises "any franchise"; and if the district attorney neglects or refuses so to do, such action may be brought in the name of the people by a private party on his own relation. Are the words, "any franchise," used in the statute, broad enough to include persons who, unlawfully and without right, perform or attempt to perform the functions of an existing corporation, by intruding themselves into and exercising the rights of the board of directors? We have examined many authorities and believe that *quo warranto* brought in the name of the people has generally been regarded a proper remedy to try the right of those who, without authority, claim to be directors and unlawfully attempt to perform the functions of a private corporation, where no other issue is involved, except in states where some special provision or procedure has been enacted for the express purpose of trying the validity of such corporate elections. Our legislature has made no such provision unless it be *quo warranto*.

No doubt the words, "any public office, civil or military," used in the act, do not apply to the officers of a private corporation, and those words are not applicable to this case. The matter herein involved is not those words, but whether the words, "any franchise," as used therein, includes the functions of a private corporation.

In *Londoner v. People,* 15 Colo. 247, 25 Pac. 183, it is said:

"A franchise with us has been defined as a particular privilege conferred upon individuals by grant from the government. Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. Franchises are vested in the corporate entity."

The franchises in the case at bar consisted in the right to be, and the privilege to conduct business, granted by the legislature, vested in the corporate entity, which right and privilege could be exercised only by a board of directors lawfully chosen by the stockholders. If not lawfully chosen, they were wrongfully exercising the right. Are the words, "any franchise," mentioned in the *quo warranto* act, broad enough to include the usurping, intruding into or exercising the powers and rights granted the corporations?

Persons pretending or claiming to be directors who are not, but who nevertheless intrude themselves into and usurp the functions of the corporation, and wrongfully exercise the powers of the board in the name of the corporation against the rights of those who are the lawful board, certainly usurp the functions of the corporation. Such intrusion into the board is an unlawful exercise of the corporate franchise already granted, by persons who are not directors, and is an usurpation of the franchise itself. Such grant, rights and privileges conferred upon a private corporation are franchises which are violated, usurped and intruded into and wrongfully exercised, whenever persons who are not directors usurp, intrude into and undertake to act as such. It is the wrongful intrusion into the board upon a false and pretended claim, and exercising the function of the corporation that constitutes the usurpation of

and wrongful exercise of the franchise. The intrusion into the board upon the false claim, and exercising the franchise of the corporation, is a usurpation and a wrongful exercise of the franchise.

Where the validity of a corporate election is in dispute, and it involves nothing but the title to the board of directors, we think, in the absence of a statute created specially for the specific purpose of trying the validity of contested corporate elections, that an information in the nature of *quo warranto* is an appropriate remedy, and that private individuals elected, but wrongfully prevented from acting upon the board by the intruders, may apply to the district attorney, and, if he fails to act, may bring an action themselves as relators in the name of the people to oust the usurpers from exercising the franchises and to install the relators.

We know we have held that where the purpose of an application in *quo warranto* is to seize into the hands of the state the franchise of the corporation, or procure its dissolution, that the application will not be entertained on behalf of a private citizen who has no other interest in the controversy than all other citizens. *People ex rel. U. P. Co. v. Colo. Eastern Ry. Co.*, 8 Colo. App. 301, 46 Pac. 219; *State R. R. Com. v. People*, 44 Colo. 345, 98 Pac. 7, 22 L. R. A. (N. S.) 810; *State v. A., T. & S. F. Ry. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761. But this action does not attack the existence of the corporation, or its franchises. This is where, according to the allegations of the complaint, the Sylvester board has usurped, intruded into and is exercising franchises already granted, the right to exercise which belongs to the Elder board.

The grant, rights, privileges and power to do business of a private corporation are its franchises, which are violated, usurped, intruded into and wrongfully exercised whenever persons who are not directors intrude themselves into and exercise such powers in the name of the corporation, and this is the usurpation of a franchise. *Quo warranto* in such a case affords a remedy. *People v. Lockhard*, 26 Colo.

App. 439, 449, 143 Pac. 273; *Hayes v. Burns*, 25 App. D. C. 242, 4 Ann. Cas. 707; *Perry v. Tuskaloosa Co.*, 93 Ala. 364, 9 South. 217; *Elliott v. Sibley*, 101 Ala. 344, 348, 13 South. 500; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 820, 31 Atl. 282, 46 Am. St. Rep. 538; *St. Patrick, etc., v. Byrne*, 59 N. J. Eq. 26, 44 Atl. 716; *Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 612, 90 Atl. 1056; *Carmel Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Hagner v. Heyberger*, 7 Watts & S. 104, 42 Am. Dec. 220-224; *Jenkins v. Baxter*, 160 Pa. 199, 28 Atl. 682; *Deal v. Miller*, 245 Pa. 1, 90 Atl. 1070; *Hullman v. Honcomp*, 5 Ohio St. 237; *New Eng. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534; *People v. Albany R. Co.*, 57 N. Y. 161; *Hartt v. Harvey*, 32 Barb. (N. Y.) 55; *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; Cook on Corporations, §§ 571-618; Cook on Corporations, p. 1687, note 1; 10 Cyc. 749; High on Injunctions, vol. 2 (4th Ed.) § 1235; High on Ext. Leg. Rem., §§ 619, 653, 664; Spelling on Inj. & Ext. Rem., vol. 2 (2d Ed.), § 1773.

In *Hayes v. Burns*, supra, it is said:

"It is the general rule that, in the absence of a statutory provision to that effect, a bill in equity is not the proper remedy to determine the question of title to an office in a private corporation where that is the main question involved."

In *Elliott v. Sibley*, supra, it is said:

"A court of equity will not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director who is in possession of the office. The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of relief depends upon its decision."

In Cook on Corporations, Sec. 618, the author says:

"A court of equity has no inherent power or jurisdiction to entertain a bill for the purpose of reviewing a corporate

election and ousting the parties who claim to have been elected."

In *Deal v. Miller,* 245 Pa. 1, 90 Atl. 1070, it is said:

"The validity of an election of directors of a corporation can not be adjudicated on a bill in equity for an injunction and a new election, *quo warranto* being the proper remedy in such case."

"It may be observed that in some of the states of the Union, by statutory enactment, courts of equity are given jurisdiction to determine the legality of the election of corporate officers, notably in the states of New York and New Jersey. We have not, however, been able to find a single case wherein the validity of an election of corporate officers can be adjudicated on a bill in equity, except where such statutory provision exists."

In *Schilstra v. Van Den Heuvel,* 82 N. J. Eq. 612, 90 Atl. 1056, it is said:

"Under the system of jurisprudence which prevails in this state, the only tribunal in which the right to an office can be judicially determined is the Supreme Court, and the only method by which it can be put in issue is by proceedings in the nature of a *quo warranto.* And this is true not only with relation to state and municipal offices, but also those of private corporations."

In note 1, p. 1687, Sec. 618, of Cook on Corporations (6th ed.), it is said:

"The title of de facto (corporation) officers to their office can not be tested by an injunction or bill in equity. Quo warranto or a proceeding under the statute is necessary."

In *New England Co. v. Phillips,* 141 Mass. 535-545, 6 N. E. 534, it is said, speaking of an injunction to restrain persons from acting as directors who had been illegally elected:

"This course is open to the objection, that suits to remove or to institute corporation officers do not belong to the original jurisdiction of chancery, and that the right to be such officer can not, in general and in the absence of special legislation affording this remedy, be tested by means of an injunction."

In High on Injunctions, Vol. 2 (4th Ed.), Sec. 1235, the author says:

"It is also to be observed that courts of equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law in the nature of a quo warranto. Nor is the fact that relief is claimed upon the ground of fraud sufficient to warrant a departure from the rule, or to justify a court of equity, in such case, in granting relief by injunction. Where, however, the question of the right or title to corporate office arises as a mere incident to the determination of a case involving property rights of which equity has jurisdiction, the rule forbidding injunctive relief does not apply. Thus, where defendants, claiming to be the directors of a railroad corporation, had forcibly seized possession of the property of the road and were using it in such a way as to cause irreparable injury to property rights, it was held that equity might properly interfere for the protection of such rights, and the fact that the court was compelled incidentally to determine the question as to the validity of the election of the directors did not deprive the court of its jurisdiction. But the decision in such case is merely for the purpose of the pending proceeding, and it does not determine the ultimate right to the office, or vacate it, if the claimant is already in possession. Indeed, the only ground upon which the jurisdiction of equity in restraint of corporate elections can be properly based is the protection of the property rights of shareholders, and it is believed that the limit to the exercise of the jurisdiction is found in such measure of preventive relief as will prevent injury to those property rights, without extending it to questions of title to corporate offices, the determination of which is to be sought in a legal rather than in an equitable forum."

In High on Ext. Leg. Rem., Sec. 653, it is said:

"Tested by these principles, an intrusion into an office

of a merely private corporation may, in this country, be corrected by information with the same propriety as in cases of public or municipal corporations, since there is in both cases an unfounded claim to the exercise of a corporate franchise, amounting to a usurpation of the privilege granted by the state."

Mr. High also says at section 664:

"The doctrine may now be regarded as well established, that an information in the nature of a quo warranto is the appropriate remedy against persons usurping the franchise or privileges of a board of trustees * * * of an incorporated church association."

Mr. Spelling, at sec. 1773 of his work, says:

"For while the public may not have any interest in the question whether A or B shall perform the duties and enjoy the emoluments of a public office, still it has an interest that neither A nor B shall usurp a public office. And the same reasoning applies where title to an office in a private corporation is in dispute, since such controversy usually involves the further question of whether a corporate franchise has or has not been usurped."

In High on Ext. Leg. Rem., Sec. 619, it is said:

"When the right to an office or franchise is the sole point in controversy, the specific legal remedy afforded by proceedings in quo warranto is held to oust all equitable jurisdiction of the case. Thus, the legality of the election of trustees of an incorporated association, and their consequent right to exercise the functions pertaining to their office, and to conduct the affairs of the corporation, will not be determined by bill in chancery, such a case being regarded as appropriately falling within the jurisdiction of the common law courts by proceedings in *quo warranto.* And since this remedy is applicable the moment an office or franchise is usurped, an injunction will not lie to prevent the usurpation, even though the respondent has not yet entered upon the office or assumed to exercise its functions. In such case the party aggrieved should wait until

an actual usurpation has occurred, and then seek his remedy in quo warranto."

We are aware that courts of equity sometimes examine into the title of a board of directors in a private corporation where there is some paramount equity to which such title is merely incidental, but such is not this case.

We are therefore of the opinion that suits in equity by injunction to restrain persons from acting as directors of a private corporation who have been irregularly elected are not proper, in the absence of special legislation, and that *quo warranto* affords an appropriate remedy in this case, and that this equitable action should be dismissed.

2. If, however, the case is considered upon its merits as tried, the question which first arises is whether any valid stockholders' meeting to elect directors was held in 1913. If not, then the directors chosen at the stated meeting in 1912 would hold over. The meeting at the First National Bank Building re-elected this old board of 1912. So, whether the rights of plaintiffs in error are based upon the meeting of 1913 or whether they claim as hold-over directors makes no difference. If they were not legally chosen in 1913, they held over and constituted the board anyhow, regardless of this meeting, unless the board chosen by the Elder faction at the E. & C. Building constituted the lawful board. This makes it necessary to determine whether defendants in error were chosen at a lawful meeting.

The lower court remarked at the inception of the trial: "I see your contention is, there was no proper meeting, and if there was no proper meeting, you are at least hold-over directors." Plaintiffs contended throughout the trial below that they were chosen directors at the 1913 meeting. Defendants contended that no valid meeting had been held, and that they were hold-over directors. The issue as finally settled and tried involved nothing but the legality of the 1913 meeting, which depended upon the regularity of the call. Plaintiffs alleged they were chosen at this meeting and clearly assumed the burden of proof. If the stock-

holders' meeting in 1913 for the election of directors was not duly called, then plaintiffs have no claim to the directorship, and the directors chosen in 1912 would hold over.

We will now consider the validity of the call for the 1913 meeting. It was a deferred stockholders' meeting to choose directors, called by the president, the notice of which reads:

"Notice is hereby given that the annual meeting of the stockholders of The Adams Mining Company is called by the undersigned, president, pursuant to the by-laws in such case made and provided, to be held at the office of the company, suite No. 1030-35, First National Bank Building, Denver, Colorado, on Thursday, the 18th day of December, 1913, at 10:00 o'clock a. m., for the purpose of electing a board of seven directors for the ensuing year."

The by-laws, authorizing the president to call the meeting, provided:

"There shall be an annual meeting of the stockholders of this company held on the second Wednesday of December each year, at the principal office of the company, in the State of Colorado, at which meeting not less than seven directors shall be elected by ballot, who shall hold office for one year, or until their successors shall be elected. In case of failure of the board of directors giving notice at the proper time of the place to hold said annual meeting, the said meeting may be called by the president in such place and at such time as he may determine, in accordance with the provisions of the charter and by-laws of the company and the laws of the State of Colorado."

The statute provides that the corporate powers shall be exercised by a board of directors, who shall be annually elected by the stockholders, at such time and place as shall be directed by the by-laws.

In regard to calling a stockholders' meeting like this to choose directors at a time other than that designated in the by-laws, the statute provides: In case it should happen at any time that an election of directors shall not be held on the day designated by the by-laws, when it should be held, such directors may be chosen at any subsequent meeting

of the stockholders. Said meeting to be called by the directors or by any two stockholders.

The day designated by the by-laws for holding the annual stockholders' meeting was the second Wednesday of December in each year, which in 1913 was December 10th. No meeting was called for or held on that day, it passed without a meeting, and the event happened mentioned in the statute, namely, directors were not chosen on the day designated by the by-laws. The meeting attempted to be held was called for by the president on the third Thursday of December, being December 18, instead of December 10. The statute provides such meeting shall be called by the directors or by any two stockholders. This is conceded, but it is claimed the meeting was called by the president as provided by the by-laws. That is immaterial. Where there is a conflict between the by-laws and the statute as to who shall make the call, the statute is controlling. The time designated by the by-laws for holding the annual stockholders' meeting having passed, unless the meeting was called by the persons designated by the statute, it had no legal capacity to enter upon the election of directors. The statute vests the power to make the call for such a meeting to elect directors in the board of directors or in any two stockholders, and a legal meeting could be convened only by following the statute, unless every share of stock was present and consented to the meeting. The complaint alleges that 10,000 shares of stock did not participate in the meeting, and the evidence shows that some 20,000 shares of stock were not represented and did not participate. The legality of the meeting and the right to choose directors depended upon the legitimacy of the call. True, the by-laws, upon which the president acted, gave him power to call such a meeting, but the statute vested that power in the board of directors or any two stockholders. The call was not valid or binding upon the corporation unless it was given by the persons authorized by statute, and no lawful meeting could be had that was not based upon a legitimate call, unless all the stock was present and con-

sented to the meeting. *State v. Pettineli,* 10 Nev. 141-145; *San Buenaventura Mfg. Co. v. Vassault,* 50 Cal. 534-537; *Charter Gas Eng. Co. v. Charter,* 47 Ill. App. 36-53; *Hill v. Railroad,* 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; *Stow v. Wyse,* 7 Conn. 214, 18 Am. Dec. 99; *In re Empire S. S. Lodge,* 53 Misc. Rep. 344, 103 N. Y. Supp. 465-468; *U. S. ex rel. Edwards v. McKelden,* 11 D. C. 162-169; *Reilly v. Oglebay,* 25 W. Va. 36, 39, 40; *Cassell v. L. H. & P. Co.,* 9 S. W. 502, 701, 10 Ky. Law Rep. 486; *Riggs v. Polk Co.,* 51 Or. 509-516, 95 Pac. 5; *In re St. Helen Mill Co.,* 3 Sawy. 88, Fed. Cas. No. 12222; *Kulinski v. Dambrowski,* 29 Wis. 109-114; Angel & Ames on Corps., §§ 491, 495; McCrary on Elections (4th Ed.), § 654; 10 Cyc. 324; 26 Am. & En. Ency. of Law (2d Ed.), pp. 987-991.

In *State v. Pettineli,* supra, it is said:

"This is an information in the nature of a quo warranto originally brought in this court to determine the title of respondents to the office of trustees of the Roman Capital Gold and Silver Mining Company. * * *

The time designated by the by-laws of the company for the election of trustees to succeed those thus selected passed without an election being held, and there was no attempt to convene the stockholders for that purpose until March 31, 1874, when the relator, as president of the company, caused a notice to be published in the Virginia Evening Chronicle, which stated that, 'A meeting of the stockholders * * * would be held at Room 21, Douglass Building, Virginia, at the hour of 7 o'clock p. m., on Monday, April 6, 1874, for the purpose of electing officers of company to serve for the ensuing year.' * * *

The statute provides: 'If it shall happen at any time that an election of trustees shall not be had on the day designated by the by-laws, * * * it shall be lawful, on any other day, to hold an election for trustees, in such manner as shall be provided for in the by-laws of the company. * * * There is no provision in the by-laws of the company authorizing the president to convene a meeting of its stockholders for any purpose; but, on the contrary, by

Article 4, the power is expressly vested in the trustees, and necessarily requires the action of the board in order to convene a legal meeting. It is true, in this case, that all of the stockholders of the company assembled pursuant to the call of the president, and by mutual agreement and consent of all, they might have proceeded to the election of trustees; but it required the consent of all the stockholders to become binding upon any. Here, then, was no such consent; and hence the attempted election by only a portion of the stockholders was illegal and void."

This case is directly in point. The Nevada statute provided that in the event the stated meeting was not held on the day designated by the by-laws, that it would be lawful on any other day to elect directors in such manner as provided by the by-laws. The by-laws vested such power in the directors. The meeting was not called by them, as provided by the by-laws, but was called by the president. Held, that in the absence of the consent of every share of stock, the meeting was illegal and void and not binding on any, because not legally called. In the case at bar, our statute vests the power to call such a deferred meeting in the directors, or in two stockholders, not in the president. It was called by the president, hence it required the consent of all the stock to become binding upon any, and without such consent was an illegal meeting, and had not power to elect directors. But, it is said, this case is different from the Nevada case, because the by-laws of the Adams Mining Company did provide that the president may make such a call. True, but that is immaterial. This part of the by-laws being in conflict with the statute, is of no effect, and the statute, not the by-laws, must be followed.

In *Charter Gas. Eng. Co. v. Charter*, supra, it is said:

"Every stockholder had a right to be present at that meeting, and it could not be legally held until after notice of the time and place had been given in an authentic and legal mode, unless all stockholders were present and consenting in person or by proxy."

In *Hill v. Railroad,* supra, it is said:

"Therefore has it always been conceded, as a just and indisputable rule in the law of corporations, that notice to each of the members of a corporation of the time and place of holding a meeting of the stockholders is absolutely essential to its validity. * * * The majority can act for the corporation, of which they constitute a part, only at a meeting which has been regularly called."

In *Stow v. Wyse,* supra, it is said:

"On the other hand, it is insisted that the meeting was illegal, and the acts done void. It is very clear that a meeting of the stockholders, constituted as this was, could do no acts binding on the company. Though a meeting regularly warned would be competent to do any act within their chartered powers, by a bare majority, yet if not thus warned, their act must be void."

In re Empire Lodge, 103 N. Y. S., at 469, 103 N. Y. Supp. 469, it is said:

"It is not a question here of who received a majority of the legal votes cast, but a question as to the legal right to hold any election at all."

In *U. S. ex rel. Edwards v. McKelden,* supra, it is said:

"It follows that the legislature relied wholly, therefore, upon the special notice as the necessary means of informing the corporators, and that a provision which requires the use of this means is mandatory. * * *

We hold, then, that the publication of the special notice in two newspapers for a period of two weeks is a condition upon which the validity of the annual meetings of this corporation depends. It appears that notice of meeting of January 20, 1879, was published for only ten days. That meeting, therefore, had no legal capacity to enter upon an election of managers, and the subsequent meetings, held upon adjournments from the original meeting, could not acquire capacity by those adjournments. If the corporators did not have proper notice of the original meeting, they did not have proper notice of its continuations. It appears,

then, that the relators have no title to the offices which they seek by this writ, and the writ must be quashed."

In *Cassell v. L. H. & P. Co.*, supra, it is said:

"The election attempted to be held under that call must therefore be regarded as illegal, and Cassell and his associates acquired no right in virtue thereof to the offices of president and directors of the company."

In *Riggs v. Polk Co.*, supra, it is said:

"It is in general essential to the validity of acts done at a special or called meeting of a corporation, that the call shall be made by the person or persons appointed by the governing statute to call such meetings, and notice must be given at the time and in the manner so prescribed."

In re St. Helen Mill Co., supra, it is said:

"Indeed, the stockholders' meeting at which these directors were elected was illegal, being held without notice, and less than the whole amount of stock represented."

In Angell & Ames on Corporations (11th Ed.), Secs. 491, 495, it is said:

"The summons must be issued by order of some one who has authority to assemble the corporation; though the want of authority in such case may be waived by the presence and consent of all who have a right to vote."

"If the members be duly assembled, they may unanimously agree to waive the necessity of notice, and proceed to business; but if any one person having a right to vote is absent or refuses his consent, all extraordinary proceedings are illegal; and if the charter requires a special notice, it can not be dispensed with even by unanimous consent."

McCrary on Elections, at Sec. 654, says:

"Meetings of shareholders held for the purpose of electing officers of the corporation * * * must be called by persons having competent authority."

10th Cyc., at page 324, says:

"Notice must be given in statutory mode."

"The requisites of the notice may be enumerated as follows: (1) It must be issued by one who has authority to issue it."

In 26 Am. & Eng. Enc. of Law. p. 991, it is said:

"Statutes specifying who must give the notice must be complied with, and a notice by any one other than the authority specified by the statute will be insufficient."

3. This was a stale case when tried. A suit involving the directorate of a corporation having property rights of this character and magnitude should be tried with diligence, especially is this true of mining property involving speculative values. The action was begun in December, 1913, and was tried in January, 1916. In the meantime, two stockholders' meetings had been held affecting the policies to be pursued by the corporation and involving the interests of the stockholders. The record discloses no reason for this delay not occasioned by plaintiffs themselves. If they had properly brought the suit in the first instance, and diligently pressed it to trial, there is no reason why a conclusion should not have been reached before the annual stockholders' election in 1914. The record impresses one that they had no desire to press the case to a speedy trial before the 1914 stockholders' meeting, and when the case finally came on for trial in June, 1915, they were unprepared for trial and asked for a continuance, and at their request the case went over to the September term, and they were not ready for trial until January, 1916. This, under the circumstances of the case, considering the nature of the property and the interests affected, was not a diligent prosecution of the case. Such a case should not only be brought with diligence, but it should be prosecuted with diligence.

In *Johnston v. Standard M. Co.*, 148 U. S. 360, 37 L. Ed. 480, 13 Sup. Ct. 585, at page 370, it is said:

"It has been frequently held that the mere institution of a suit does not of itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun."

Judgment reversed and cause remanded with directions

to the District Court to enter a judgment of dismissal.

Reversed and remanded.

Decision *en banc.*

Mr. Justice Hill, Mr. Justice Scott and Mr. Justice Teller dissent.

Mr. Justice Teller dissenting:

The majority opinion gives to chapter 27 of Mills Code, commonly known as the *quo warranto* statute, a construction so at variance with what I think it should be, that I deem it proper to state in some detail the grounds of my dissent.

The opinion cites authorities to show that *quo warranto* is the proper proceeding to test the right to the office of director of a private corporation, but ultimately determines the case on a construction of our statute, holding that one who assumes, without right, to act as a director usurps or unlawfully holds a franchise.

As to the authorities cited on the question of procedure, it is sufficient to say that they refer to statutory procedure, more than one-half of the states having statutes expressly providing for the testing of a right to office in a private corporation by *quo warranto,* or by some other statutory action.

Since, however, the opinion bases the reversal of the judgment on the ground that a franchise has been usurped, and not upon the ground that the right to an office, *eo nomine,* is under our statute to be determined by *quo warranto,* I do not think it necessary to pursue that branch of the question.

The majority opinion states, in effect, that the plaintiffs in the suit consider that a question as to the exercise of a franchise is involved, when it says:

"This is where, according to the allegations of the complaint, the Sylvester board have usurped, intruded into and are exercising franchises already granted, the right to exercise which belongs to the Elder board."

The complaint contains no allegation that even suggests that plaintiffs regarded the office of director as a franchise,

nor does the record anywhere contain anything to that effect.

The opinion quotes from *People v. Londoner*, 15 Colo. 247, 25 Pac. 183, a definition of a franchise, and a statement that "franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. The franchises are vested in the corporate entity," but the quotation omits the very important concluding words of the paragraph, viz: "rather than in the officers."

How this can be supposed to sustain the position taken by the court is not apparent.

If franchises vest in the corporation, rather than in the officers, the holding of the office of director, although not lawful, is not an illegal holding of a franchise. With deference to the opinion of the majority, I submit that the decision is reached by a confusion of ideas. The holding is that to act as a director upon a false claim of right, so to do is a wrongful exercise of a franchise. If that be true, the right to act as a director must be a franchise, and there must be as many franchises as there are directorships. The mistake lies in considering the individual action of a director as an exercise of a corporate franchise. It is the combined action of a majority—the action of the board—which becomes the action of the corporation and constitutes the exercise of a franchise. That this is so will appear from a simple illustration.

Suppose a board of five directors, of whom two are not entitled to the office, but acting therein; the board, the three *de jure* directors concurring, performs some corporate act. If it is within the corporate franchise, no one can complain of it. If it is not an authorized act, nevertheless it is not due to the holding of office by the *de facto* directors, and the ground of complaint is not against them, but against the *board*, for the exercise of a franchise not granted to the corporation. The case is not different when the *de facto* directors concur in the action. Its validity depends not on their title to office, but on the terms of the secondary franchise, the franchise *to do*.

How, then, can it be said that, because men not entitled to act as directors have so acted, there has been a wrongful exercise of a corporate franchise?

The opinion recognizes, as it must, that, in general, corporations have but two franchises; one to be a corporation, and the other to do whatever the charter authorizes to be done. No additional franchises to be directors have been mentioned, and no such franchise is known to the law.

Speaking of a franchise, the court said in *Arapahoe County v. Printing Co.*, 15 Colo. App., at p. 203, 61 Pac. 499:

"As applied to corporations, it constitutes its right to do business, and, also, in so doing, to exercise certain special powers and privileges which do not belong to citizens of the county generally of common right, and is vested in the corporate entity."

In *Am. S. & R. Co. v. People*, 34 Colo. 240, 82 Pac. 531, this court discussed franchises, pointing out that there is a primary franchise *to be*, and a secondary one *to do*, i. e., to carry on the business which the corporation is organized to transact; but nowhere is there a suggestion that there are still other corporate franchises. A franchise is a grant or special privilege conferred by the sovereign power of the state. A corporation can not come into being without the power so to do is granted by the state, either by general or by special legislation; and when so in being, it can do only that which its charter authorizes it to do. Does any one suppose that the power to act as a director is a grant from the state in the sense in which a franchise is said to be granted? True, the office is created by law, but the right to hold it is conferred by the stockholders. It is the right to hold the office, and not the office, which is in controversy. In the case of the Adams Mining Company, the secondary franchise is the right to do whatever a mining company may do under our laws. If it does no more than that, its franchise has not been wrongfully used, whether it has been under the control of directors *de jure* or *de facto*. If it exceeds its powers, it is for the state to take

action to prevent a misuse of the franchise. *Commonwealth v. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50. There being no franchise to act as a director, there can be no usurpation of a franchise by an unauthorized holding of such office.

If an unfounded claim to the office of director of a private corporation is a franchise, it is at least surprising that the majority opinion cites no case to that effect. It is also to be noted that in the decisions of this court and the Court of Appeals no case can be found in which the term franchise is used as including an office. Furthermore, since the question of right to office in a private corporation in no way concerns the public, the majority opinion is squarely in conflict with the case of *People ex rel. v. C. E. Ry. Co.*, 8 Colo. App. 301, 46 Pac. 219. The syllabus of that case states that:

"Proceedings in the nature of *quo warranto* are available only to protect public interest as contradistinguished from private rights. As a rule, whenever it is discovered that such proceedings are brought for the latter purpose, they are not entertained."

In the opinion it is said:

"There seems to be no dissent from the general position that in order to support an action by the people for the redress of a wrong, that wrong must appear to have been done to the people."

The controversy in the case at bar is one wholly concerning private rights. So long as the corporation does not exceed its chartered powers, the public is not at all interested in the question as to who exercises those powers.

The opinion reiterates that the exercise of powers as a director by one not entitled to the office is the usurpation of a franchise, and adds: "*Quo warranto* in such a case affords a remedy," followed by the citation of a number of authorities. The case from 26 Colo. App. is not in point, since it concerned a claim to be a corporation, in which it is not denied that *quo warranto* is the remedy. The other citations support the statement that *quo warranto* affords

a remedy, but not that the unlawful holding of the office of director is the usurpation of a franchise. Upon the first point, however, the cases cited are not pertinent in this case, because they are without exception from jurisdictions in which the scope of *quo warranto* has been enlarged by statute to include offices in private corporations. An examination of the citations from text books shows that the general statement that *quo warranto* is the remedy in a case like this is based on decisions where the writ was proper because of the statutory provision above mentioned.

If the common law information applied, it is very remarkable that it never has been so applied in England, and that in this country the information has been by statute made available in an inquiry like this, or other statutory proceedings have been provided.

The majority opinion then discusses what is called "the merits of the case as tried," including, it is said, the question of the validity of the meeting of December 18, 1913. It is stated, in such discussion, that "plaintiffs contended throughout the trial below that they were chosen directors at the 1913 meeting. Defendants contended that no valid meeting had been held, and that they were hold-over directors. The issue as finally settled and tried involved nothing but the legality of the 1913 meeting, which depended upon the regularity of the call."

The above statement as to the defendants' contention is without any support in the record, and must have been based upon allegations in the brief of plaintiffs in error.

The complaint, p. 12 of Abstract, charges the defendants —plaintiffs in error here—with claiming to be directors under the election of December 18, 1913. The fourth defense (Abstract, p. 30) alleges "that the annual meeting of the stockholders was held on Thursday, the 18th day of December, 1913; * * * that Sylvester and the other defendants were elected directors for the ensuing year, and entered upon the discharge of their duties," etc.

Nowhere in the pleadings is the legality of that election questioned, and the case was tried throughout on the theory

that the persons then elected were entitled to the offices. Indeed, the first defense sets up that since there was an election of directors on December 9, 1914, "the validity or invalidity of the election held December 18, 1913, was *no longer* of any importance." This refers to the validity of the *election,* and not of the meeting. The only reference to the validity of the meeting was made by the court in the inquiry whether defendants admitted that the annual meeting of December 18, 1913, was a properly called meeting. To this the attorney for the defendants replied: "I want that question passed upon by the court." The court then said: "I see your contention is there was no proper meeting, and if there was no proper meeting, you are at least hold-over directors." The attorney said: "They must show a proper meeting." The cause then proceeded, and a mass of evidence was introduced on both sides to show what was done at the 1913 meeting.

The right to the proxies held by the respective parties was litigated at length, and the question suggested by the court was not again mentioned at the trial. Evidently the parties recognized that without raising that issue by the pleadings, it could not be tried, and, as both sides, in terms, based their claims to office on that election, and defendants themselves introduced in evidence the call for that meeting, the court was justified in finding that the validity of the call was admitted. The first mention of the matter on the part of the defendants is in the motion for a new trial, where it is pointed out that the meeting was held on the third Thursday in December, while the by-laws named the second Wednesday of that month for the annual meeting.

It is impossible, therefore, to support a reversal on that ground, without violating the rule that a new issue can not be injected into a case after trial.

If, as is clear, our statute does not cover a contest over an office in a private corporation, and there is no other remedy at law, it would seem that equity should have jurisdiction.

In *Pagosa Springs v. People*, 23 Colo. App. 479, 130 Pac. 618, it is held that the equity powers granted to the district courts by our constitution are not limited to cases known to equity jurisprudence at the time the constitution was adopted, and that they should be expanded to include cases in which the law affords no remedy. That case involved an election under the local option statute, and it was held that a denial by election officials of the right to vote was a fraud on the rights of an elector.

This principle has been recognized in other jurisdictions, where officers of corporations have attempted by fraud to obtain control.

In *Trask v. Chase*, 107 Me. 137, 77 Atl. 698, it was held that an unauthorized sale of stock, to enable a majority of the directors to secure control of the company through ownership of a majority of the shares, was a fraud on the other stockholders; and that a suit in equity to redress the wrong was proper, even though there might be another remedy.

It seems to be the practice in Kentucky to test the right to corporation offices by suits in equity, the parties found not to be entitled to the offices being restrained from claiming them. *Proctor Coal Co. v. Finlay et al.*, 98 Ky. 405, 33 S. W. 88; *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 92, 72 Am. St. 427, 58 L. R. A. 809.

To deny stockholders the right to vote is as great a fraud as to issue new stock to gain control of the corporation, the result in each case being to take from the holders of a majority of the stock the right to control.

The case at bar, as here presented, charges the defendants with fraud and collusion in the holding of an election of directors of a private corporation with a view to the control of the corporation and its property.

This gives the court jurisdiction, though there are other grounds upon which the jurisdiction may be sustained.

The right of a majority to elect directors and control the corporation is a vested property right. *State v. Greer*, 78 Mo. 188; *Smith v. R. R. Co.*, (C. C.) 64 Fed. 272; *Hays v.*

Commonwealth, 82 Pa. St. 461; *Baker's Appeal,* 109 Pa. St. 461.

A court of chancery must, therefore, have jurisdiction to try a case in which such right is involved, there being no remedy provided by statute.

The right to vote at a corporate election may be protected by a court of chancery, and there are many cases in which the authority has been exercised, even to the extent of holding the state powerless to change the manner of voting from that prescribed in the charter.

It would be a vain thing for a court to intervene as to the manner of electing, if it had no power to give relief when a fair and valid election is prevented by fraud, or otherwise.

The evidence fully sustains the finding of the trial court that "the rights of the majority stockholders were most grossly violated by the defendants," and it would be a reproach to our jurisprudence if no adequate and immediate remedy were provided. Equity furnishes that remedy.

It may be conceded that equity has no jurisdiction to decide an election contest when it involves only the question of the right to vote, or the regularity of the election in some particular, when there is no charge of wrong doing or bad faith; but, where there is a charge that defendants conspired to prevent and prevented a fair election, for the purpose of retaining control of a corporation, some of the defendants thus conspiring having property interests to be conserved by such control, a different rule prevails. A court of equity may then act to prevent the fruition of the fraudulent designs.

The fact that the title to corporate offices was also involved did not oust equity of jurisdiction.

Having taken jurisdiction on settled equitable grounds, the court was entitled to retain it and try all the issues. These propositions require the citation of no authorities.

The judgment is right and ought to be affirmed.

Decided December 3, A. D. 1917. Rehearing denied February 4, A. D. 1918.

No. 8644.

JAMES v. JAMES.

1. WILLS—*Contest—Incapacity—Undue Influence.* Testimony held sufficient to warrant the findings that the testator was mentally incapable, and acted under undue influence of the devisee.
2. EVIDENCE—*Witness—Competency.* Will Contest. Under Rev. Stat. sec. 7267, brothers of the testator were held properly admitted to deny statements made by the testator touching alleged troubles and controversies with them, the statements having been made in the presence of the proponent of the will, and the principal beneficiary thereunder.
3.—— *Letters—Constituting but a Part of a Correspondence,* are not admissible in evidence.

Error to Rio Blanco District Court, Hon. John T. Shumate, Judge.

Mr. DYSON S. DINES, Mr. ORVILLE L. DINES, Mr. PETER R. HOLME and Mr. GEORGE A. PUGHE, for plaintiff in error.

Mr. JOHN T. BOTTOM, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is a proceeding in contest of the will of Thomas E. James, who died on the 10th day of May, 1913, and who executed the instrument on the 27th day of February preceding.

The estate is estimated to be of the value of one hundred thousand dollars. The deceased was a bachelor, and his heirs were Walter James, residing at Rifle, Colorado, and to whom was bequeathed $1,000; Edgar James of Chicago, not mentioned in the will, and Levina Stevens, a sister, residing at Kansas City, Missouri, to whom was bequeathed $350 each year for a period of fourteen years, all of whom are the protestants; also William H. James, proponent and residuary legatee under the will. These are the brothers and sister of the testator. The grounds of the protest are mental incapacity, and also undue influence upon the part of William H. James, his wife and family.

The protest was sustained in all respects by the court and jury, and judgment rendered accordingly.

It appears that the testator, with his brother, William, settled in what is now Moffat county, about twenty-five years before the testator's death; that within a few years William removed to Chicago and entered the coal business, apparently leaving no property interests in Colorado; that about the same time Walter, then a boy, or perhaps a young man, came to Colorado, and lived and worked with the testator for many years, and until within a very few years before the latter's death. Thomas and Walter were together engaged in the ranch and cattle business. Walter later sold his interests to Thomas, and removed to the locality of Rifle, Colorado. Some time after this, and during the year 1911, testator visited his brother William in Chicago, and in the same year William sold his coal business to the brother Edgar, and with his wife and family came to the ranches of testator, and continued to reside there until testator's death. From the time of his removal to the ranch of Thomas, William took the responsible charge of testator's affairs, the latter living with William and his family.

The testimony shows that about ten or more years before his death, the testator became afflicted with epilepsy; that these attacks increased in frequency and severity; that for more than two years prior to his death the attacks occurred as frequently as once in two weeks, and with great severity, requiring several days in certain instances for recovery, and that he finally died in one of these attacks. There does not appear but two business transactions upon the part of testator after the time proponent and his family came to live with him and manage the ranch. He kept no account at his local bank and paid no bills thereafter. The first of these transactions was the execution of a deed in March, 1912, conveying his ranch lands to the proponent, reserving a life estate therein. The other was the execution of the will in question, and a bill of sale of his personal property to the proponent at the same time. Neither the deeds nor the bill of sale are in evidence.

The will purports to ratify the deed in the following paragraph:

"First: Heretofore I have made, executed and delivered to my brother, William H. James, now a resident of Moffat county, Colorado, a certain deed, by which I conveyed, or intend to convey, all my right title and interest in the James Brothers' Ranches, situate in Moffat and Rio Blanco counties, Colorado, and in all real estate and water rights standing in my name, or of which I was the owner subject to a life interest therein reserved by me in and by said deed. I hereby confirm said deed, and direct that on my death my life interest in the property in said James Brothers' Ranches, and all my other interest therein, shall vest in my brother, William H. James, if living; if not, in his heirs at law; and if for any reason said deed shall be defective in form or insufficient to convey said property therein described, or any part thereof, or any part of the James Brothers' Ranches, I hereby give, devise and bequeath to my said brother, William H. James, all my right, title and interest in and to said the James Brothers' Ranches, together with all water rights, ditches, flumes, conduits, reservoirs and other rights of a similar nature appurtenant to said land, or of which I may die seized."

The will was made under circumstances substantially as follows:

William, the proponent, his wife and the testator, came to Denver from the ranches on January 1st, 1913, and remained at a hotel until February 7th. They were absent from the 7th to the 17th of February, spending this time at Fort Collins, when they returned to the hotel, and remained until March 4th. Speaking of the testator, the hotel clerk, testifying on behalf of proponent, said, "I never saw him go away by himself. They were all together. Just one family."

It appears that William James took the testator to the office of his own attorney on the 18th or 19th day of February, introduced him, and told the attorney that the testator

wanted him to draw a bill of sale and a will. The attorney seemed to hesitate, because of his professional relationship with William, and the matter was deferred until the following day, when the two brothers returned to the law office, and the bill of sale and will were drawn. The testator took the will with him, and with William returned in about a week, and with the will slightly changed, and when it was executed.

Speaking of the appearance of the testator during these visits to his office, the attorney testified that he was very fragile; that as a reason for his conclusion that the will should be executed while testator was in Denver, he assumed he was dealing with an epileptic who was in a bad state of health, and felt that they absolutely knew his condition at that moment, and that his will could be then executed with less ground for an attack on it.

The attorney testifies that when the brothers returned after about a week's absence, he expressed surprise, supposing that they had returned to the ranch, but that William took him to one side and said that testator had not been well, "You know he is in pretty bad shape, been lying down or in bed, or something of the sort, and said such things as led me to believe that he had suffered an attack," though the witness had since learned otherwise.

The parties left Denver for the ranch on March 4th, and the testator died on May 10th.

The testimony in the case, medical and otherwise, is very voluminous, and, while conflicting, is amply sufficient to justify the jury in finding that the testator was incapacitated mentally to make the will, and likewise to support the allegation of undue influence, therefore the verdict and judgment will not be disturbed upon the ground of insufficiency of the testimony to support the verdict.

Error is assigned as to certain instructions of the court. We have examined these and are of the opinion that there is no reversible error in this respect. The law applicable

to the issues involved here is quite fully discussed in the case of *Davis v. Davis,* decided at this term of court, and in the authorities therein cited, and it can serve no useful purpose to repeat the discussion.

Mr. Dines, who drew and witnessed the will, and who is the attorney for proponent in this case, testified that the testator told him during the period when the draft of the will was under consideration, in substance, that he had difficulty with his brother Walter, and that the brother Edgar had married a woman whom he very much disliked.

Presumably this testimony was offered as tending to furnish a reason for disinheritance. There was no other testimony even tending to show any estrangement between the testator and either of these two brothers. Both were permitted to testify in rebuttal of Dines' testimony, and it is very strenuously argued that the admission of the testimony constituted prejudicial error as being in violation of sec. 7267, Rev. Stat. 1908, and the case of *In Re Shafters Estate,* 35 Colo. 578, 85 Pac. 688, is cited. But since that case was decided and by the law of 1907, the statute was amended by the addition of the following exception:

"Sixth: In any such action, suit or proceeding, any adverse party or parties in interest may testify as to any conversation or admission, or as to all matters and things connected with the subject matter of said action, suit or proceeding, and which conversation and admission and matters and things aforesaid, occurred before the death and in the presence of such deceased person, and also in the presence of any member of the family of such deceased person over the age of sixteen years, or in the presence of any heir, legatee or devisee of such deceased person over the age of sixteen years. Provided, however, that such member of the family, heir, legatee or devisee, as the case may be, is present at the hearing of said action, suit or proceeding, or whose testimony is or may be procurable at such trial."

The court admitted this testimony expressly upon his

finding that the statements were made in the presence of William H. James, heir and devisee of the deceased.

The testimony of Walter James was in substance as follows:

"Q. You heard the testimony of Mr. Dines that Thomas E. James, your brother, had said to him that he had a fuss with you, or had some trouble with you? A. The statement was not true."

The testimony of Edgar James so objected to was in substance as follows:

"Q. Did you hear the testimony of Mr. Dines yesterday? A. I did.

Q. Did your brother, Thomas E. James, ever at any time or place, or in any manner or form, by word of mouth, letter or other communication, object to your marrying your wife? A. I have no recollection whatever of anything of the kind."

If this testimony is barred under the general rule, then it is brought within the exception. But it is difficult to see the materiality of the testimony of either Mr. Dines or the brothers.

It is contended that the court erred in refusing to admit certain letters identified as having been written by the deceased to Wm. H. James, and his wife, and others written by Edgar James, one to Thomas E. James, and one to James Brothers, These were identified by the wife of the proponent. It is patent that the letters were in reply to others, and form only a part or one side of the same correspondence in each case. The witness thought she could produce the letters to which those offered were in reply, and was given opportunity to do so and failed. The court then excluded the letters offered. It is a well settled rule of law that individual letters constituting a part of a general correspondence between parties as to a particular matter are inadmissable, unless the entire correspondence is offered. It does not appear that these letters are ma-

terial in any event and might well have been excluded for that reason alone.

The judgment is affirmed.

En banc.

White, C. J., and Garrigues, J., not participating.

Decided January 8, A. D. 1918. Rehearing denied April 1, A. D., 1918.

No. 8698.

SAULPAUGH ET AL. *v.* HAMILTON.

1. LANDLORD AND TENANT—*Assignment of lease.* The landlord's assent to the tenant's assignment of his lease does not relieve the latter of liability for the rent.

Nor does the acceptance of rent from the assignee.

2.—— *Landlord's Failure to Record a Chattel Mortgage,* securing the rents, does not impair his right to look to the lessee for rents.

Error to Denver District Court, Hon. George W. Allen, Judge.

En banc.

Messrs. DANA & BLOUNT, and Mr. RICHARD A. SMITH, for plaintiffs in error.

Messrs. GOUDY, TWITCHELL & BURKHARDT, for defendant in error.

Opinion by Mr. Justice Teller.

PLAINTIFFS in error brought suit against the defendant in error to recover on a covenant in a lease to pay the rent of a hotel, and, the court having directed a verdict for the defendant, and entered judgment thereon, they bring the cause here for review. The parties will here be designated as they were in the trial court.

The lease on which the action was brought was made by the plaintiffs as lessors, and the defendant as lessee, for a term of years, and contained a provision which permitted the lessee to assign it to a corporation thereafter to be organized; but provided that "said lessee shall remain

personally responsible for the fulfillment of all the terms of said lease, just the same as if such transfer was not made."

Soon after the execution of the lease it was assigned by the defendant to the Mankato Hotel Company, a corporation organized to take it over.

Some two years later the plaintiffs, on the solicitation of the defendant, consented to an assignment of the lease by the corporation to one Heldenbrand and one Miller. This consent provided that it should "not in any way release the said Charles B. Hamilton or the Mankato Hotel Company from liability for rent upon said lease," etc. These assignees failing to pay the rent, the lessors brought this action against the defendant as lessee.

The lease gave the lessors a lien on the furniture in the hotel, for the rent, but the lease was not recorded. Hendenbrand and Miller gave a chattel mortgage on said furniture to secure a debt to a bank, which mortgage was afterwards foreclosed.

The defense was that the lessors, by consenting to an assignment of the lease, and the acceptance of the Hotel Company, and the subsequent assignees, as tenants, relieved the defendant of the liability for the rent. It is also contended that the defendant, after the assignment, was a mere surety for the assignees, and that the failure of the plaintiffs to record the lease, and so preserve their security, discharged the defendant from his obligation to pay rent.

It is the settled law in this jurisdiction that mere assent to an assignment of a lease, and the acceptance of rent from an assignee does not release the lessee from his covenant to pay rent. *Wilson v. Gerhardt,* 9 Colo. 585, 13 Pac. 705. This is the law also in Minnesota, where this lease was made. In *Reese v. Lowy,* 57 Minn. 381, 59 N. W. 310, it is said:

"Nothing is better settled than that a surrender of a lease, or a release of a lessee, is not to be implied from the mere facts that a lessor assented to the assignment of the

lease, and accepted rent from the assignee in possession."

That is a settled rule of law. 6 M. A. L. 292; 24 Cyc. 1177.

This being so, it is difficult to perceive upon what ground a release is to be presumed in the face of an express condition that the assent shall not work a release.

The extended discussion by defendant's counsel of the plaintiffs' duties to defendant as a surety wholly overlooks the fact that while as between him and his assignee he was a surety, as to the lessors he was a principal by an express covenant to pay the rent. Defendant's relation to plaintiffs as a debtor being fixed by the lease, it could not be changed except by an agreement with the plaintiffs to that effect.

Instead of such an agreement we find plaintiffs making their assent to the assignments conditional upon defendant's remaining liable for the rent. Since the plaintiffs had the right to look to defendant as the principal debtor —as well as to the assignees—the question of their failure to protect the security by way of the lien on the furniture need not be considered.

The assignments were both made at the instance of the defendant, and it would be a miscarriage of justice to allow those acts thus induced to defeat the plaintiff's right to recover.

The court erred in directing a verdict, and the judgment is therefore reversed.

Judgment reversed.

Mr. Justice Allen not participating.

Decided January 7, A. D. 1918. Rehearing denied March 4, A. D. 1918.

No. 8733.

EISENHART *v.* CITY AND COUNTY OF DENVER.

TOWNSITES—*Probate Judge as Trustee.* Under the act for the relief of the citizens of Denver (5 Stats. at L. 657) the Probate Judge was trustee for those actually occupying lots in the

townsite at the date of the entry, and as to them only to the extent of such occupancy.

The finding of the trial court being sustained by competent testimony the judgment of the Court of Appeals (27 Colo. App. 470) was affirmed.

Error to the Court of Appeals.

En banc.

Messrs. HILLIARD, LILYARD & FINNICUM, and J. R. ALLPHIN, for plaintiff in error.

Mr. J. A. MARSH, Mr. G. Q. RICHMOND, for defendant in error.

Opinion by Mr. Justice Teller.

THIS cause is before us on error to the Court of Appeals which affirmed a judgment of the district court in favor of the defendant in an action brought by the plaintiff in error to recover possession of real estate.

The facts are fully set forth in the opinion of the Court of Appeals (27 Colo. App. 470, 150 Pac. 729).

The principal controversy is due to a difference between two surveys, the plaintiff claiming that the original conveyance by the Probate Judge, under the town-site act of 1864, was according to a survey made in 1859, while the defendant contends that it was made under a survey made in 1865. By the later survey a large part of the land platted in the first survey as lots 8, 9 and 10 of Block 103, East Division of Denver, is placed in the bed of Cherry Creek.

We agree with the Court of Appeals that the facts of this case do not justify a presumption that it was intended that the grantee in the original deed should take title to the central line of Cherry Creek. The Probate Judge was a trustee, under the statute, for those who were actually occupying land at the date the town-site was entered, and, as to them, only to the extent of such occupancy.

The rule invoked by plaintiff has no application to such a case.

There is no direct evidence to show under which survey the conveyance was made, and we are left to determine the question by inference from the facts as stipulated.

The Court of Appeals was of the opinion that the findings of the trial court were sustained by competent evidence, and we cannot say that it was wrong in thus concluding.

The judgment is therefore affirmed, and the cause remanded to the district court.

Judgment affirmed.

Decided January 7, A. D. 1918. Rehearing denied March 4, A. D. 1918.

No. 8773.

WALKER ET AL. v. THE PEOPLE.

1. TAXATION—*Taxable Property.* Bonds to bearer, payable in another state, owned by a resident thereof, and in his possession there, are not subject to inheritance tax in Colorado.
2. INHERITANCE TAX—*What Taxable.* It is the right of succession and not the property left by the decedent, which is the subject of the inheritance tax.

Bonds payable to bearer, the property of a resident of another state, and there situate, are subject upon his demise to the laws of such other state. Neither such property, nor the right of succession thereto, have any status in this state.

The fact that bonds are secured by a mortgage of lands within this state does not affect the question.

Error to Denver District Court, Hon. William D. Wright, Judge.

Mr. WILLIAM N. VAILE, for plaintiffs in error.

HON. LESLIE E. HUBBARD, Attorney General and Mr. JOHN L. SCHWEIGERT, Assistant Attorney General, for the People.

Mr. Justice Bailey delivered the opinion of the Court.

THIS is a proceeding to review a judgment of the District Court affirming an order of the County Court, fixing the amount due the State as inheritance taxes in the

estate of John U. Brookman, deceased. Brookman was a resident of the State of New York. Included in his estate were certain unregistered bonds of a Colorado Corporation, the payment of which was secured by mortgage on certain real property situated in the States of Colorado, Wyoming and New Mexico. The decedent held these bonds in the state of his residence. Upon the theory that they were property within this state, because of the situs of some of the real property mortgaged to secure their payment, the Inheritance Tax Appraiser imposed a tax upon their transfer by inheritance. In substance the executors contend that the tax is not authorized by the statute, on the ground that the bonds are not property within the state within the meaning of the statute, and that to give the law a construction necessary to include and cover the bonds would be a violation of both the state and federal constitution.

The Inheritance Tax Law of 1913, Laws 1913, page 539, under which the Appraiser assessed the tax, is, so far as applicable, as follows:

"A tax shall be, and is hereby, imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, to any person or persons, institution or corporation, except as hereinafter exempted, in the following cases: * * * When the transfer is by will or intestate laws of property within the State, and the decedent was a nonresident of the State at the time of his death."

There is no dispute of the State's right to impose an excise on the bonds passing by inheritance, if they are to be considered as property within the State. As was stated in *Brown v. Elder*, 32 Colo. 527, at page 532, 77 Pac. 853, 855:

"First, an inheritance tax is not one on property, but one on the succession; second, the right to take property by devise or consent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it. From these principles

it is deduced that the State may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of the respective state constitutions requiring uniformity of taxation."

Decedent was a resident and citizen of the State of New York. The bonds, drawn to bearer, were payable in New York and were kept by him at his domicile there. Prior to his death they manifestly were beyond the reach of the taxing power of this State, for any purpose. Upon his decease the right of succession was governed by, and subject to, the laws of New York, not of Colorado, and neither the bonds, as the measure of the tax, nor the right to take them by inheritance, which is the thing actually taxed, have any *situs* in this State. The rule is stated in 37 Cyc. 1562, as follows:

"Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a non-resident, and this is without regard to the place where the certificates may be kept. But a different rule applies to the bonds of a corporation. The bonds of a domestic corporation are not taxable at the domicile of the corporation if kept at the domicile of a non-resident owner, but are subject to the tax if physically present in the State, although belonging to a non-resident decedent."

It is contended by the State that the fact that the payment of the bonds is secured upon property within this State brings them, as evidence of this debt, within its power for the purpose of taxation, on the ground, among others, that creditors are compelled to invoke local laws to enforce the obligation. *Blackstone v. Miller,* 188 U. S. 439, 47 L. Ed. 439, 23 Sup. Ct. 277, is cited and relied upon in support of this contention. The question in that case was whether a debt due an Illinois decedent by a co-partnership in New York, and money deposited by him in a

New York trust company, were taxable under a clause in the New York Inheritance Tax statute, imposing a tax:

"* * * upon the transfer of any property, real or personal * * * When the transfer is by will or intestate law, of the property within the State, and the decedent was a non-resident of the State at the time of his death."

The court held in substance that this class of indebtedness was taxable in the state where the debtor resides, when the property is actually physically there. It is urged by the State that this case is decisive of the one at bar, and that it in effect overrules the authority relied upon by plaintiffs in error, which is primarily State Tax on Foreign Held Bonds, *sub nom. Cleveland P. &. A. Co. v. Pennsylvania,* 82 U. S. (15 Wall) 179, 21 L. Ed. 179. In which case a tax was levied upon bonds of a corporation doing business in Pennsylvania, when the bonds were kept at the domicile of the owner in another state. At page 187 the court said:

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

"The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they

are held by non-residents of the State, they are property beyond the jurisdiction of the State."

This principle, unless overruled by *Blackstone v. Miller, supra,* clearly precludes the taxation of the Brookman bonds as property within this State. That the court, in *Blackston v. Miller, supra,* had no intention to overturn its decision in State Tax on Foreign Held Bonds, *supra,* so far as it affected bonds, is clearly evident from the opinion therein, where, at page 445, the court says:

"There is no conflict between our views and the point decided in the case reported under the name of State Tax on Foreign Held Bonds, 15 Wall. 300, *sub nom. Cleveland P. & A. Co. v. Pennsylvania,* 21 L. Ed. 279. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker,* 177 Mass. 335, 337, 58 N. E. 1078, 83 Am. St. 279. Therefore, considering only the place of the property, it was held that bonds held outside of the State could not be reached. The decision has been cut down to its precise points by later cases. *Savings & L. Soc. v. Multomah County,* 169 U. S., 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempl,* 175 U. S. 309, 319, 320, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110."

The cases cited by defendant in error are all distinguishable by some vital and controlling fact from the case at bar. Thus, in *Blackstone v. Miller, supra,* ancillary administration was in progress in the courts of the taxing state, 112 N. W. 131, 11 L. R. A. (N. S.) 1134, 119 Am. St. 677. This is also true in *In re Rogers Estate,* 149 Mich. 305; *Albany v Powell,* 55 N. C. 51; *State v. Dalrymple,* 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372, and in the Massachusetts cases.

It is settled law that it is the succession which is the subject of the tax, and not the thing inherited. In the

case at bar here is no ancillary administration here. The decedent, the legatee, and the bonds themselves, now are, and have been at all times, beyond this jurisdiction. So far as the bonds in question be concerned, there is no property, or evidence of indebtedness belonging to the Brookman estate physically within this jurisdiction, nor is this State concerned in any manner with the process of succession. In substance it is urged by defendant in error that the State has authority under the statute to tax the right of non-resident legatees to inherit property outside of the State, under the foreign-probated will of a non-resident testator. The bonds being unregistered, pass upon delivery, just like money. They are manifestly transitory and fugitive, and this State is powerless to place its hand upon them, for the purpose of taxation, in the absence of direct, specific legislation to that effect. For taxing purposes the debt which the bonds represent is the property of the bond holder, and not of the debtor. The *situs* of the bonds is the domicile of the owner, and they are taxable there. This is the rule except when such property is not in the custody of the non-resident owner, but is physically present in the state proposing to levy the tax.

Cases in state courts denying the right to tax evidences of indebtedness secured by local real estate, but held abroad, are the following:

In re *Preston's Estate,* 78 N. Y. Sup. 91, the syllabus reads as follows:

"Bonds of a private individual secured by a mortgage on real estate in New York, both bonds and mortgage being kept in good faith outside of the State, are not subject to taxable transfer acts."

The court, citing *In re Bronson's Estate,* 150 N. Y. 1, said it was unable to distinguish this case from that "where it was held that bonds of a domestic corporation owned and held in a foreign State could not be reached by the taxable transfer acts," citing, also, State Tax on Foreign Held Bonds, *supra.*

Gilbertson v. Olive, 129 Iowa 568, 105 N. W. 1002, was decided under a statute providing that "all property within the jurisdiction * * * and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, or by the statutes of inheritance, of this or any other State, or by deed, grant, sale or gift, in possession or enjoyment after the death of the grantor or donor, to any person in trust, or otherwise * * * is subject to a collateral inheritance tax. Part of the property involved was notes and mortgages, owned by residents of Iowa and secured by property situated therein. The court admitting that "there is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicile of the owner, or whether the actual *situs* of the property determines the liability to taxation," says:

"The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicile of the owner, and not elsewhere, unless the owner has himself given it a different *situs.*"

The court then quotes *City of Davenport v. M. & M. R. R. Co.,* 12 Iowa 539, to the following effect:

"It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but the mortgage itself, being personal property, a chose in action, attaches to the person of the owner."

The court also quotes with approval from *Hunter v. Board of Supervisors,* 33 Iowa, 376, 11 Am. Rep. 132, to the following effect:

"The debt due, of which the notes are the evidence, is property vested in the owner wherever he may reside. This property in the right—the chose in action—is as absolute a property therein, and he is as well entitled to it as he is to tangible property in possession; and this species of property, debts due, must in the nature of things, follow and be with the owner, except perhaps when he has conferred authority upon some one else as his agent to loan,

manage, receive and collect the same for him * * * The right to the 'money due' being in the appellant, the property in the right must of necessity be in the place where he resides, irrespective of the *situs* of the evidence."

In *In re Fearing's Will*, 200 N. Y. 340, 93 N. E. 956, it is stated in the syllabus:

"Transfer Tax Law (laws 1892, c. 399), Sec. 1, provides that a tax shall be imposed on the transfer by will, or intestate law, of property within the State, where the decedent was a non-resident at the time of his death. Held, that bonds passing under the will of a non-resident pursuant to a power of appointment were not property within the State within such act, and subject to taxation because the bonds were secured by mortgages on lands located in New York."

At page 958 of the opinion in 93 N. E., the court said:

"Whether the bonds were secured * * * by corporate property * * * or by mortgages of the property of individuals, they represent, equally, debts of their makers, which as choses in action, under the general rule of law, are inseparable from the personality of the owners."

The contention of defendant in error prevail only upon the theory laid down in *Blackstone v. Miller, supra*, to the effect that, for inheritance tax purposes, a debt may be taxed at the domicile of the debtor; but this was declared where the property was physically in the taxing state, and ancillary administration was in progress in its courts, and can not be considered an authority for the imposition of the tax under consideration. In any event, bonds, such as are here involved, are specifically excepted by that opinion from the operation of the special rule therein laid down.

It will be observed that in some of the cases the domicile of the owner has been held to furnish the test of jurisdiction for the purpose of taxation, while in others this test has yielded to the actual *situs* of the property within the territorial limits of the taxing authority, but in no case has the domicile of the debtor, or the location of the securities, been taken as *situs* for the purpose of taxation in the ab-

sence of some special circumstances which the court considered gave it an actual *situs*. No such circumstance exists here. Moreover, whether the test to be applied is the domicile of the owner, or the place where the securities are actually located, since both are in the State of New York, the conclusion must be that the bonds are exempt from taxation in Colorado.

The judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Decision *en banc*.

Mr. Chief Justice Hill and Mr. Justice Scott dissent.

Chief Justice Hill dissenting:

In re Bronson, deceased, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. 632, decided October the 6th, 1896, it was held that bonds of domestic corporations owned by, and in possession of, a non-resident decedent at his domicile at the time of his death, and which then passed to non-residents by will or the law of descent in the state where he lived, were not subject to taxation in New York under that portion of its transfer tax act which reads, "When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident at the time of his death." In construing this language, the court considered with it and gave emphasis to section 22 of the New York act which defines the word "property" as meaning all property or interest therein over which the state had jurisdiction for the purposes of taxation. A very able dissenting opinion was rendered by Justice Vann, concurred in by Justice O'Brien; the majority opinion was written by Justice Gray.

In re Houdayer, deceased, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. 642, the same court held that individual deposits of a non-resident decedent in a trust company in that State were subject to this tax under the same act. The opinion was by Justice Vann, and per his reasoning, it was a debt owing by the trust company to the non-resident decedent, yet regardless of this he held it was

property within the state so far as the transfer act or inheritance tax law so-called was concerned, it being agreed by all (and is conceded here) that it is not a tax upon property, but rather upon the right to receive it. Justice O'Brien concurred with Justice Vann; Chief Justice Andrews and Justices Bartlett and Martin concurred in the result, upon the theory that a deposit of money in a bank, although technically a debt, is still money for all practical purposes, and as such was taxable under the transfer act. Justice Gray filed a dissenting opinion, in which Justice Haight concurred, to the effect that the trust company was a mere creditor of the decedent, and for that reason that it did no constitute property within the state, so far as their transfer act was concerned. I am unable to harmonize the two opinions, or to gather from them sufficient upon which to hazard a guess as to what the future position of that court will be on similar questions. The former of these cases is the only case cited in Vol. 37 Cyc. 1562, to sustain its statement set forth in the opinion of the court here, to the effect that the right to inherit these bonds, when held by a non-resident in another state, is not subject to such a tax in the state where issued, and where the lands covered by the mortgage to secure them is situate.

In *Blackstone v. Miller,* 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. 277, it was held that a deposit by a citizen of Illinois in a trust company in New York was subject to the transfer tax in New York, notwithstanding that the whole succession had been taxed in Illinois, including this deposit. This opinion was not upon the theory of the three members concurring in the opinion in the New York case last referred to, but to the contrary takes the position of Justices Vann and Gray, that the relation was that of debtor and creditor, but disagreed with the latter as to the result which should follow. For instance, the court says, "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is, mill make him pay." And again

"Power over the person of the debtor confers jurisdiction we repeat. And this being so, we perceive no better

reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death."

In commenting upon State Tax on Foreign Held Bonds, 15 Wallace 300, 21 L. ed. 179, the court distinguished it from this class of cases and, among other things, said:

"The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker,* 177 Mass. 335, 337, 58 N. E. 1078, 83 Am. St. 279. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases."

For the reason last stated, and the fact that the case referred to was concerning a tax on property, and not a tax upon the right to inherit it, I do not think it applicable here. In *State v. Probate Court,* 128 Min. 371, 150 N. W. 1094, L. R. A. 1916 A 901, it was held that a promissory note, as well as a book account, of a Minnesota corporation held by a resident of Pennsylvania and who died with the note in his possession in the latter state, was subject to a tax upon the right to succeed to the ownership of said property in Minnesota under the language of their act, which reads:

"When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a non-resident of the state at the time of his death."

This case goes into the history of the question in detail, showing that the right to succeed to ownership is taxable by the state having jurisdiction of the debtor, for the law of that state furnishes the means to compel payment, etc. While the Minnesota act has these additional words not contained in our act, viz: "or within its jurisdiction," I can not see that they add anything to its scope. The words "within this jurisdiction" are used alternately with the words "within the State" and to my mind mean "within

the State." The reasoning of the Minnesota court gives no extra effect to them, but is just as applicable to the paragraph had they been omitted.

In Re Rogers' Estate, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. 677, the court held that notes secured by mortgages on lands in Michigan given by residents of that state, owned by a non-resident and held by him at his home in New York at the time of his death, were subject to an inheritance tax in Michigan under the provisions of their act which reads "When the transfer is by will or intestate law of property within the state, and the decedent was a non-resident of the State at the time of his death." This is the exact language of our act. Theirs was passed in 1903, ours in 1913. Their decision placing a construction thereon was announced July 15, 1907. Hence, long before our legislature adopted the exact language of the Michigan act, it had before it the construction of the Michigan court thereon, holding that it made subject to this tax a note held by a non-resident given by a citizen of their state when secured by a mortgage upon lands within the state.

The holding in *Kinney, executor v. Treasurer*, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912 A 902, is to the same effect as the Michigan court, under a somewhat similar statute. In commenting, the court said:

"The question before us is whether these securities are property within the jurisdiction of the common wealth, in reference to taxation upon the succession * * *. The debt belongs with the mortgage, and it must co-exist to give the mortgage validity. For that purpose it has a *situs* within the jurisdiction of the State where the land lies."

The only distinction between the two cases last cited and this is that the bonds under consideration are payable to bearer, but for the purposes of this tax it appeals to me that it is a distinction without a material difference. All the authorities that I have been able to find are to the effect that under similar language the right to succeed to ownership of stock of a domestic corporation held by a non-

resident is subject to this tax. The Minnesota case applies it to an unsecured note as well as a book account, the Massachusetts and Michigan cases to notes secured by mortgages, the Supreme Court of the United States case to a bank deposit, on the theory of simple debtor and creditor. The reasoning in all is to the effect that the *situs* of the property for the purpose of this tax is at the domicile of the debtor or where the property covered by the mortgage is situate. In such circumstances, when the language of our act is considered as a whole, I am of opinion, as said by Mr. Justice Holmes in *Blackstone v. Miller*, *supra*, concerning the New York act that it was intended to reach the transfer of this property if it can be reached. The opinion, as I understand it, concedes that it can be reached by appropriate legislation. I am of opinion that it has already been reached by the language used. Whether ancillary administration is in progress or not, in my opinion, makes no difference. The question to be determined is, whether our act has attempted to, or whether we can, tax the right or privilege to inherit or succeed to such property. This should be determined by conditions as they exist at the time of the death of the testator. Such being the case, I am unable to appreciate wherein the question of ancillary administration cuts any figure, pertaining to the construction which should be given to our act. It might aid the collection of this tax, but I cannot agree that there should be any difference in the rule to be applied to the same class of property simply because one estate has ancillary administration pending and the other has not. The fact that these bonds can be transferred by delivery in another state, in my opinion, makes no difference, they are not money. A note endorsed in blank can be thus transferred, and if secured by mortgage, per former ruling of this court, such a transfer carries with it the equitable right to have the mortgaged property disposed of in satisfaction of the debt. A bond of the kind under consideration is but a promise to pay and is in a sense but a promissory note. It is common knowledge that stocks in domestic corporations are quite often endorsed in blank by the

person to whom issued, and thereafter sold and transferred by delivery through the hands of numerous persons, I can think of no reason why a book account may not be thus assigned to bearer and pass title accordingly. If it is for the reason that the bonds are payable to bearer that they are exempt from this tax, then, in my opinion, it is a reason which sacrifices substance to form.

Decided January 7, A. D. 1918. Rehearing denied April 1, 1918.

No. 8790.

THOMSON ET AL. *v.* COLORADO PORTLAND CEMENT CO.

SALE—*Implied Warranty—Contract Construed.* Defendant agreed to sell to plaintiff a quantity of cement of two kinds, to be used in the construction of an irrigation dam. One of these was designated as Portland cement and the other as Alkali Proof. The contract of sale guaranteed that the Portland cement should meet certain standard specifications, but provided that the seller "will not be responsible for the improper use of cement." The amount of cement to be furnished was specified. *Held,* that notwithstanding the provision quoted, there was an implied warranty on the part of the seller that the cement should be fit for the purpose for which it was purchased.

That whether the dam was to be entirely of cement or only the core, was immaterial.

That it was only against the improper use of cement that the seller refused to guarantee.

The rule that an express warranty precludes an implied warranty has no application where the express warranty is of one article and an implied warranty is asserted as to another.

Error to Denver District Court, Hon. Geo. W. Allen, Judge. En banc.

Mr. BARNWELL S. STUART and EDMUND J. CHURCHILL, for plaintiffs in error.

Messrs. BENEDICT & PHELPS, for defendant in error.

Opinion by Mr. Justice Teller.

THE plaintiffs in error entered into a contract for the purchase of a quantity of cement designated in the contract as "Ideal or Alkali Proof Portland Cement."

The contract was on a printed form, the words "or Alkali Proof" being written in ink. The contract recited that the cement was to be used in the construction of an irrigation dam. Paragraph 12 of the contract is as follows:

"No. 12. That the Ideal Portland Cement shipped hereunder is guaranteed to meet all requirements of the United States Government and the standard specifications of the American Society for Testing Materials. That the seller will not be responsible for the improper use of cement, therefore, will not guarantee finished work."

Six hundred and twenty barrels of Alkali Proof Cement were furnished under the contract and full payment made therefor.

The plaintiffs in error brought suit against the defendant in error to recover damages alleged to have been suffered by reason of the poor quality of the cement. On a motion to strike parts of the amended complaint, the court held that the fact that only the Ideal cement was expressly warranted in said paragraph 12 did not show an intention to exempt the transaction from an implied warranty that the Alkali Proof cement was fit for the use for which it was purchased, to the knowledge of the seller.

Thereafter the defendant filed a general and special demurrer to said complaint, which, having been overruled, the defendant filed an answer.

When the cause came on for trial, defendant objected to the receipt of any evidence on the ground that the amended complaint did not state a cause of action. The court, by a different judge from the one who had made the former rulings, as above stated, sustained the objection, holding that the contract expressly negatives the inference that there was an implied warranty of the cement furnished. It was further held that the purpose for which the cement was to be used was not sufficiently specified in the contract to justify an implication of warranty. There-

upon the plaintiffs asked leave to amend their complaint by adding various allegations, including one to the effect that the dam mentioned in the contract was to have a core of concrete, which the defendant, when making the contract, knew was to be made of the cement to be furnished by it.

This application was denied, the court in making this ruling announcing that the refusal of the seller to guarantee the finished work was a refusal to warrant the cement.

The contract provides for the sale of 3,000 barrels of cement "to be shipped and used in the work herein described," and further "that this contract is intended to cover, and does cover, the entire quantity of Portland Cement which the buyer shall be required to, and in fact, furnish, during the time specified herein on the following described work, to-wit: Throttle dam and appurtenances. Actual work on, together with shipment of cement for, the foregoing described work to commence within thirty (30) days from date hereof."

"That the amount of Portland cement required for the foregoing described work is estimated by buyer and his customer at 3,000 barrels; but nothing herein contained shall obligate the seller to furnish more than the quantity of cement actually furnished by buyer, and used for said work, nor in any event more than 3,000 barrel (being amount of Portland cement required in said described work, per estimate, plus 10 per cent)," etc.

From this it appears that the parties made an estimate of the quantity of cement needed for the work, and whether it was to be used in making a dam entirely of concrete, or only the core of a dam is wholly immaterial. In either case the cement must have been intended to be fit for making concrete.

There is nothing to suggest that it was intended for other than the ordinary use, which is for the making of concrete.

We cannot, therefore, agree with the court that the purpose of the purchase was not known to the seller.

Nor can we accept the court's construction of paragraph 12 of the contract.

The court expressed the opinion that the contract excludes every opportunity of the application of the rule of an implied warranty," and apparently based it on the refusal to guarantee finished work.

This, however, is in conflict with the first portion of that paragraph which does guarantee one of the two kinds of cement mentioned. At the time of the making of the contract, it was not known, we must suppose, which kind of cement would be used, and, if the refusal to guarantee the finished work is a refusal to guarantee the cement used in the work, it must apply as well to the one kind as to the other.

The court's construction entirely overlooks the fact that the refusal to guarantee is expressly predicated upon the ground of the possible improper *use* of cement. It was the improper use of the cement of either kind mentioned for which the seller refused to be responsible. With this fact in view, it is impossible to say that the seller was not required to furnish cement fit for the purpose intended. If the cement furnished failed to meet proper tests of its quality, made before it was put into the dam, the implied warranty was broken, and the buyer need not wait, before rejecting it, till it had proved bad in the finished work. It was clearly the intent of the seller to avoid responsibility for finished work which was bad because made so by the improper use of good cement.

When contracting concerning two kinds of cement, either one of which might be used, and possibly some of both, no reason is suggested why the buyer should relieve the seller of the ordinary warranty of quality which the law implies; and, unless the language used clearly requires that construction, it ought not to be so construed.

We find nothing in the instrument which indicates that the parties made such a contract as the trial court supposed.

The rule that an express warranty precludes an implied

warranty has no application when the express warranty is of one article, and the implied warranty is on another.

The complaint alleged not merely that the concrete was bad because of defective cement, but that the cement was of insufficient tensile strength; that it was defective, inferior and worthless for the purpose for which it was sold to the plaintiffs.

A cause of action was stated, and the court erred in sustaining the objection to any evidence. The amendment offered was unnecessary because the complaint was good as it stood.

The judgment is accordingly reversed.

Judgment reversed.

Chief Justice White dissents.
Mr. Justice Allen not participating.

No. 8812.

COLLAR *v.* GAARN ET AL.

1. APPEALS AND ERROR—*Short Record.* The submission of a cause upon an agreed Short Record commended.

2. WILLS—*Construction.* Every will is to be construed as a whole, and effect given to each of its provisions if possible.

3. —— *Legacy—Specific or Demonstrative.* If compatible with the language employed, a legacy will be declared general or demonstrative, rather than specific.

4. —— *Construed.* Bequest of a note of $1,000, loaned to the I. O. O. F., to be delivered to the legatee "as soon as possible after my decease, or if that cannot be done she shall receive the interest until the principal is paid to her." The legatee was directed to turn over $100.00 towards "my funeral expenses", and requested to bequeath "the remainder of the proceeds of the note" after her death, to members of the family named. Prior to the death of the testator the note had been paid in part, and for the residue certain bonds of the Odd Fellows' Association had been accepted, and were a part of the estate. *Held* the legatee was entitled to the bonds.

Error to the Denver District Court, Hon. George W. Allen, Judge.

Mr. PERCY S. MORRIS, for plaintiff in error.

Mr. FRANK L. GRANT, for defendant in error Ruby Ames Gaarn.

Mr. Justice Hill delivered the opinion of the court:

THIS action is submitted upon an agreed short record on error. (The practice is commendable.) It involves a construction of the will of Ann Eliza McLaughlin. The portions necessary to consider read:

"First. As to my worldly estate and all property, real or personal, which I shall have at the time of my decease, I hereby dispose of it in the following manner, to-wit:

My real estate, consisting of lot fourteen (14) and adjoining fifteen (15) feet of lot thirteen (13), block forty-four (44) Evans' Addition * * * probably worth eight thousand dollars ($8,000)—I have also a note of one thousand dollars ($1,000) of money loaned to the I. O. O. F., and held by Charles D. Cobb; also, a small note of sixty-seven and fifty one hundredths dollars ($67.50) from Andrew C. Gaarn, my niece's husband. I do not wish the above described real estate to be sold at a sacrifice if it is possible to avoid it, but after my decease, in order to settle the estate and pay some unpaid debts, my funeral expenses and some bequests I wish to make, it will probably be necessary to sell, so whenever it can be sold, in the judgment of the executors of this will and of my niece, Ruby Ames Gaarn, without too much sacrifice * * * I give them (my executors) full power to sell and convey this property. * * *

Third. As soon as possible after my decease I wish my niece, Emily Collar, to have the note of one thousand dollars ($1,000) loaned to the I. O. O. F., and held by Charles D. Cobb, turned over to her; or if that cannot be done, I

will that she shall receive the interest thereon until the principal is paid to her, and when the principal is paid, as her bequest is the largest I have made, I will and direct that she shall turn over one hundred dollars ($100) toward my funeral expenses or to the expenses of administering my estate. I pray my niece, Emily Collar, to make and publish a last will and testament, wherein the remainder of the proceeds of said note, whether in money or other property, shall be bequeathed and devised to Drue, wife of my nephew, Horatio Ames Collar, in the event of my niece, Emily Collar, dying without issue living at the time of her death."

The record discloses that prior to the death of the testatrix $550 of this so-called I. O. O. F. note had been paid and that the money received therefor with some $200 additional, and the note with this payment endorsed thereon, had, by her agent, Mr. Cobb, been exchanged for twelve bonds of $100 each, issued by the Odd Fellows' Temple Association of Denver and that these bonds were a part of her estate at the time of her death.

This suit was instituted by Ruby Ames Gaarn, the residuary legatee, to determine the interest of Miss Collar under paragraph 3 of the will, etc. The question is, was the bequest to her of this thousand dollar note a specific legacy, etc., or was it in the nature of a demonstrative legacy, which, in a way, applies to both general and specific legacies. The trial court held, in substance, that it was a specific legacy, and that it had been extinguished, for which reason that Miss Collar should take nothing by this bequest. We cannot agree with this conclusion. Had the language used devised the note to Miss Collar and stopped there, the bequest would have been specific and become extinguished by the payment or other disposition of the note during the lifetime of the testatrix. *Nusly v. Curtis,* 36 Colo., 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. 113, 10 Ann. Cas. 1134. But such is not the case here. In ascertaining the meaning of any portion of a will, the instru-

ment should be considered as a whole and effect given to all of it, if possible. 40 Cyc. 1408-1409. Paragraph 1 sets forth the testatrix's property. In paragraph 3 she says not only that she wants Miss Collar to have this note turned over to her, but if that cannot be done she will that she receive the interest thereon until the principal is paid to her, not until the principal is paid, but until it is paid to her. This language, in substance, not only bequeaths the note to her, but provides that if it cannot be given her, that the principal shall be paid to her; also that she should receive interest until such time as the principal is paid to her. It does not stop there, but provides that when the principal is paid, as her bequest is the largest, that she shall turn over $100 toward funeral expenses or the expenses of administration; and it does not stop there, but requests that Miss Collar, by will, under certain conditions, leave a certain amount of the proceeds of this note, whether in money or property, to another. In paragraph 7, under which Mrs. Gaarn was made the residuary legatee, it makes her such to the extent only "when all of the above bequests have been paid." As the bequest to Miss Collar is the only one, in any substantial amount, which it is claimed is specific, the language last quoted is further evidence of the testatrix's intent that it was to be demonstrative in character. This paragraph also contains the request that Mrs. Gaarn by will leave certain amounts to others. This also strengthens Miss Collar's contention that the bequest to her was demonstrative. In *Nusly v. Curtis, supra,* we said:

"Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general, or demonstrative,"

Such being the general rule, when this will is considered as a whole, we conclude that the bequest to Miss Collar was in the nature of a demonstrative legacy, and that she is entitled to have it satisfied out of the Odd Fellows' Temple Association bonds. *School District v. International Co.,* 59 Colo. 486.

The judgment will be reversed and the cause remanded for disposition accordingly.

Reversed and remanded.

Decision *en banc.*

Chief Justice White dissenting.

Mr. Justice Allen not participating.

Decided January 7, A. D. 1918. Rehearing denied March 4, A. D. 1918.

No. 8868.

CLARKE v. THE PEOPLE.

1. CRIMINAL LAW—*False Pretenses*, made to the prosecutor a considerable time before he parted with his money, which have produced the effect to mislead and deceive, and still remain in his mind, and induce his action, bring the case within the statute, even though, at the time of acting, he is not consciously reflecting upon or remembering such false statements.

An instruction authorizing a conviction upon "subconscious" remembrance of the former false statement, held, not erroneous.

2. —— *False Pretenses Deceiving the Person to Whom it is Made*, is within the statute. It need not be such as would deceive a person of ordinary prudence.

3. —— *Intent to Defraud*, need not exist at the time of making the false representation. If in obtaining the prosecutor's money, the accused makes no retraction or qualification of the previous statement, and is intending to have advantage of its probable effect upon the mind of the prosecutor, he is guilty.

Such conduct of the swindler is equivalent to a reiteration of the previous false statement.

4. —— *Instructions—Construction.* All instructions are to be taken together. What, considered by itself, might mislead, may be corrected by another passage of the charge.

5. —— *Construed.* An instruction that if any witness had wilfully falsified, any material fact, the jury "should give any other testimony of such witness" weight "according as you deem it credible, in view of all of the evidence," approved.

6. —— *Non-Direction*, where no instruction is prayed, is not error.

Error to Weld District Court, Hon. Robt. C. Strong, Judge.

Mr. EDMUND J. CHURCHILL, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, and Mr. WENDELL STEPHENS, Assistant Attorney General, Hon. LESLIE E. HUBBARD, Attorney General, and Mr. JOHN L. SCHWEIGER, Assistant Attorney General, for The People.

Mr. Justice Allen delivered the opinion of the court.

THE plaintiff in error, hereinafter also referred to as the defendant, was convicted of obtaining money by false pretenses, and brings error.

The evidence, on the part of the prosecution, shows that one O. F. Broman, the prosecuting witness, had several conversations with the defendant during October, 1913. In those conversations the defendant represented to Broman that the Clarke Medical Company had at that time in operation two institutions for the treatment of persons afflicted with either the liquor, or the morphine habit; that one of such institutions was located at Denver, and the other at Trinidad; that the one at Trinidad took care of the miners there, and was a paying institution, because a good many miners addicted to strong drink were willing to pay the fee; and that the institution at Denver was well equipped, had sixteen beds, besides a county ward, where county patients, averaging about twelve a year, were accommodated. The evidence further shows that in those conversations the defendant represented that the company earned, in the business, between 240 and 260 per cent. dividends on its capital stock, and that it had $6,000 in the bank. It was also represented by the defendant that there was never any difficulty in having the alleged Denver institution filled with inmates, and that the average fee in each case was $175, and that the county of Denver paid $100 for the treatment of each county patient.

The defendant denied that he made such representations. It appears to be conceded that the statements or pretenses, if made, were false. The defendant was a director in the

Clarke Medical Company, and a majority of the shares in the company was held by his wife. After these conversations between Broman and the defendant took place, and during the same month, the defendant came into Broman's office and, as Broman testified, "pulled out these stock certificates." It appears that on that occasion the defendant transferred to Broman 1,000 shares of stock in the company, and received from Broman a check for $200, at that time, and a check for $800 at a later date.

The first contention of the plaintiff in error is that the trial court erred in refusing to direct a verdict of acquittal. It is claimed that the evidence fails to show that Broman relied upon the representations, or that they constituted the initial cause of his paying the defendant the money as charged.

Broman testified on direct examination that he believed the representations that the defendant made; that he acted upon them; and that if he had not believed them he would not have paid $1,000 for the stock. This witness further testified that he secured the stock as a result of the defendant's representations, and that on account of such statements he gave defendant the two checks of $1,000.

The plaintiff in error, defendant below, insists that this testimony of Broman must be qualified by what the witness said on cross-examination, and that his testimony on such cross-examination materially, if not altogether, destroyed the specific statements, above mentioned, made in the direct examination.

We do not take this view of Broman's testimony. He testified on cross-examination that he did not give the matter any serious thought at the time he took the stock, and that the stock transaction "came at the psychological moment." The witness also said: "I accepted the papers because they made out the papers to me, or because of the impression received regarding the business in the past." In answer to the question: "Did you turn over in your mind any specific statement you had heard whether from Clarke (the defendant) or anyone else?," the witness said: "No,

I don't know that I did except in a subconscious manner perhaps."

This evidence did not contradict, nor was it inconsistent with the testimony given in chief. One may rely upon statements previously made to him, and act on, and because of, the same, without consciously reflecting upon those statements, provided the impressions theretofore created by such representations still remain on his mind.

The evidence was sufficient to warrant the jury in finding that the prosecuting witness relied and acted upon the false pretenses. In the case of *State v. Thatcher*, 35 N. J. L. 445, the prosecutor did not expressly testify that he was induced to act because of the false pretenses but the court said:

"It is sufficient, if the jury are satisfied that the unlawful purpose would not have been effected without the influence of the false pretense, added to any other circumstance which might have contributed to control the will of the injured party."

There was no error in refusing to direct a verdict of acquittal, upon the ground mentioned.

The plaintiff in error further contends that the trial court erred in including in the instruction numbered 7 the expression: "whether consciously so induced on the part of Broman." The context of this expression, or the portion of the instruction containing the same, reads as follows:

"And in this case, if you find from the evidence beyond a reasonable doubt that the defendant falsely made in substance, any of the alleged pretenses without at the time intending Broman to act thereon in purchasing the stock of the company, but afterwards sold to Broman the stock with intent and design that Broman should rely upon and be influenced to buy such stock and make payment therefor because of the former false pretense, or false pretenses, whether consciously or subconsciously so induced on the part of Broman, you should in such case treat such former pretense as though by adoption renewed upon such dealing by the defendant on trial."

The expression contained in the instruction, and objected to in this connection, was evidently intended to be adapted to the theory that a person may be induced to act upon statements previously made to him without, at the time of acting, thinking about any of the statements. Such theory is correct because impressions are formed and a belief may be created at the time when the representations are made, and a party may act upon and because of the statements and pretenses, without consciously reflecting upon them, or even upon the belief which they created. In such case it may be said that a person is acting "subconsciously" in reliance upon the truth of the statements previously made to him because of the impressions created on his mind by such statements. The testimony in this case justified, though not required, some instruction based on this theory.

The instruction given is not erroneous. When considered along with other instructions, it is not misleading on account of its reference to the subconscious mind or its use of the phrase, "consciously or subconsciously." In other instructions the jury were told that it must be shown that Broman parted with his money, and the defendant received it, by means of the false pretenses, and, that in order for a pretense to be an inducing cause of the paying of money it is necessary that it be shown that the money would not have been paid if such pretense had not been made, and had not been believed and relied upon. The jury was told that all instructions must be taken, considered and read together. There was no prejudicial error in the giving of instruction 7, when viewed with reference to the objection now made to it.

The plaintiff in error also complains of instruction numbered 7 upon the ground that it "fails to state the law with reference to the intent on the part of the accused persons" in cases of this kind.

The instruction, among other things, states:
"nor is it requisite that the person charged * * * should have intended and designed by such pretense, at the time of making * * * the same to obtain the money * * * from

the person whom it is afterward obtained by reason thereof, provided that the person so making * * * such pretense upon the subsequent occasion of obtaining the money * * * from the person to whom it had so before been made * * * designed or intended at the time of the obtaining of the money * * * to take advantage of the previously made and manifested false pretense, knowing that the same was adapted or likely to induce the other to part with the money * * * and failing to make known the truth in relation to such pretenses."

The statute defining the offense of obtaining property by false pretenses provides that, if any person shall knowingly and designedly, by false pretenses, obtain from another person, any money or other property, with intent to cheat or defraud such person of the same, he shall be guilty of the offense. There is no doubt that it is the obtaining the money by means of false pretenses, with intent to cheat or defraud the person from whom it is obtained, that constitutes the gist of the offense. *Shemwell v. People*, 62 Colo. 146, 161 Pac. 157, 161. The intent to defraud must exist at the time when the property is obtained. 19 Cyc. 416. The instruction given is in accord with this rule, but the instruction is complained of because it assumes that the intent to defraud need not exist "at the time of making" the false pretenses. That, however, does not render the instruction defective.

"The false pretense need not originally have been made for the purpose of defrauding, however. If it is reiterated for that purpose, it is sufficient. *Reg. v. Hamilton*, 1 Cox C. C. 244." 19 Cyc. 416, note 65.

The instruction complies with this last mentioned rule, since it requires that the prosecution show that the accused "designed or intended at the time of obtaining of the money to take advantage of the previously made and manifested false pretense."

The testimony shows that during October, 1913, the complaining witness talked with the defendant almost every day for many days, "and almost invariably the conversation

led to the nature of the business engaged in, the success of the treatment, the financial success of the business, the conversation would lead up to that one thing."

Apparently after Broman became impressed with a belief in the truth of the defendant's representations, and while still being deceived thereby, the defendant came to his office and "pulled out the stock certificates." It was then that the stock was transferred, and the defendant obtained the money. Neither at that time, nor at any other time, did the defendant retract or change the pretenses or statements theretofore made by him, but allowed them to remain within the knowledge of Broman, as they were originally stated. We deem such conduct on the part of the defendant to be an implied representation that the facts still existed as theretofore stated, and equivalent to a reiteration or renewal of the pretenses previously made. The instruction given was applicable to the evidence, and was not erroneous.

The fourth assignment of error relates to the giving of instruction numbered 10, and the fifth assignment of error is predicated upon the following portion of instruction 10:

"If you believe from the evidence that a witness has knowingly, wilfully and corruptly testified falsely to any fact material to any issue in this case, you should disregard such false testimony, and should give any other testimony of that witness such weight, or no weight, according as you deem it to be credible in view of all the evidence, and particularly of any deemed by you to be credible evidence, that may tend to corroborate it in whole or part."

It is only this above quoted portion of instruction 10 which is argued and criticised in the brief of plaintiff in error, and the remainder of the instruction therefore need not be considered. It is claimed that the instruction is erroneous on account of the use of the word *"should."* It requires no argument to show that defendant could not have been prejudiced by instructing the jury that they *"should"* disregard testimony which was *false* and given

when the witness "knowingly, wilfully and corruptly testified falsely." As to the use of the word "should" with reference to the "other testimony," such use did not make the instruction erroneous. The jury were not told that they should disregard such other testimony, but rather were instructed, in effect, to give such testimony the consideration due it, in view of all the evidence and particularly of corroborating testimony.

Error is assigned to the giving of instruction numbered 5, which reads as follows:

"In order to constitute a false pretense within the meaning of the statute, the pretense need not be such as will impose upon a person of ordinary prudence or such as cannot be guarded against but by that caution or common prudence; but any pretense which deceives the person designed to be deceived thereby is sufficient, although it would not deceive a person of ordinary prudence, or would not deceive some other person or persons under the like circumstances."

The instruction as given, correctly states the law on the point covered. *Miller v. People*, 22 Colo. 530, 45 Pac. 408. The plaintiff in error contends that the trial court erred "in refusing to modify the said instruction by submitting to the jury the rule that in determining whether the representations complained of were calculated to deceive Broman, the jury should take into consideration the intelligence and ability of the witness Broman."

Submitting to the jury the rule mentioned in this contention would not "modify" the instruction given, but would merely add a further proposition of law which is not inconsistent with anything contained in the instruction as given. No instruction was offered by the defendant at the trial with reference to this rule. Mere non-direction by the trial court affords no ground for reversal, where a proper instruction covering the point omitted was not requested and refused. *West v. People*, 60 Colo. 488, 491, 156 Pac. 137, and cases cited; 12 Cyc. 658.

We find no error appearing in the record. The judgment is affirmed.

Affirmed.

Decision *en banc.*

Decided January 7, A. D., 1918. Rehearing denied March 4, A. D., 1918.

No. 9249.

GARCIA v. THE PEOPLE.

1. CRIMINAL LAW—*Evidence*—Dying Declaration. The victim of the accused being conscious of impending death, and the wounds manifestly mortal, her dying declaration was held properly received.
2. —— *Murder or Manslaughter.* If the husband takes the life of his spouse on mere suspicion, or even a just conviction, of prior acts of adultery on her part, his crime is murder and not manslaughter.

Error to the Conejos District Court, Hon. Jesse C. Wiley, Judge.

Mr. E. S. COUNSELLOR, Mr. JAMES D. PILCHER, and Mr. ALBERT L. MOSES, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH, Miss CLARA RUTH MOZZER, Assistant Attorneys, General for The People.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff in error was convicted of the murder of his wife. His crime was fixed at murder in the second degree, and he was sentenced accordingly. There are two assignments of error important to consider. The first is the admission in evidence of the dying statement of the deceased, and the second relates to the refusal by the court to give an instruction tendered.

It appears that the time of the homicide, the accused and his wife were living separate and apart from each other, and that a suit by the accused for divorce was then pending. The shooting occurred on the evening of April 9th, 1916, at about eight o'clock, and at the home of deceased.

Her death occurred as a result of the shooting, on the morning of April 25th, 1916.

The dying statement was made the day following the shooting. The record does not disclose that any other person aside from defendant and the deceased wife, witnessed the shooting. The dying statement is as follows:

"I, Maximiana Lobato de Garcia, make this, my dying declaration, being on the point of death and not expecting to live: I was at home yesterday afternoon between seven and eight in the evening. The children were outside—my two children. Leofredo Garcia came to the door—to the step before the door. The little girl cried, 'There comes my papa now.' I opened the door and he came in right away. When he was going in he leaned against the door and I noticed he had a pistol in his back pocket on the right side. He came to the middle of the room, and he says to the children, speaking to the boy, 'Is that you, Leo?' and he says to the girl, 'Is that you, Adelina?' I was standing inside the room on the right side of the door when I heard him talk that way to the kids. I says, 'What is the matter with you?' When I said that I walked about two or three steps toward him, and he stuck his hand in his pocket where he had the pistol. Then I took the boy inside the door of the same room and tried to go out, carrying the child in my arms and walking backwards. I went out of the room with the baby in my arms and walking backwards. He went out after me and stood at the door with the pistol in his hand and told me, 'Turn the boy loose.' I went outside, and walking backwards, went towards the west. He followed me, trying to get behind me—I was facing him all the time. About three feet in front of the electric light pole in front of the door he came up to me in front of me, as if trying to take the child away from me. There he throwed his right arm over my shoulder and turned me with my face towards the north. He caught hold of me by my shoulder or by the sleeve, I don't remember which, and pushed me. There it was he shot at me the first time, hitting me in the back on the left side. I fell then and dropped the child. I felt

wounded and I took hold of my left hand with my right hand and raised it. I came running all the road, taking hold of my arm. About eight or nine yards from where he gave me the first shot when he shot me on the left leg below the knee near the shoe. Afterwards I heard two more shots, but I do not know where. That is all—I came into Mrs. Dubor's and told them to phone to the doctor and to the marshal. He had threatened to kill me and the children before—one time it was Nov. 9.

(Signed) Maximiana Lobato de Garcia.

Witness:

Henry F. Jordan,

Amarante Lopez."

The deputy district attorney, who took the statement, testified:

"Q. Is it your language or the language of the deceased? A. It is the language of the deceased.

Q. How did you happen to go there to get this statement? A. I went there for that purpose.

Q. You suggested that to her, did you? A. No, sir, I asked her if she wished to make any statement. She looked to me like she was sick, and her words were—I asked her if she desired to make a statement, and she said she did, she said to me that she was going to die, and was not going to live; that was not a suggestion on my part. As a matter of fact, she didn't die for fifteen days after making the statement, but she told me she was going to die."

The attending physician testified as to the character of the wounds and as to the fatality of the same as follows:

"On the 9th day of April, last year, I was called to the home of Mrs. Marcus, in Antonito, across the tracks, and found Mrs. Garcia standing in the front room with blood streaming down the front of her body and the back, and she was in a very nervous condition. I made an examination of the wounds and found a gunshot wound, apparently entering below the shoulder blade behind and emerging in front under the collar bone; in the leg, a gunshot wound, entering above the heel about the midline, and emerging

from the outside of the leg, I think somewhat below the media. The first wound passed through the skin, the fat, the muscles of the back and chest, either through the lung, through the pleura in front, either through or between the ribs in front, through the muscles, fat and skin.

This would cut blood vessels of large size. I continued to attend the deceased until her death, which occurred on the morning of April 25, 1916, at about 7:00 o'clock."

We think that under this state of facts, the court did not err in the admission of the dying statement. This question has been considered many times by this court and the rule is perhaps more clearly and concisely stated in *Brennan v. The People,* 37 Colo. 256, 86 Pac. 79, than in any other, where it was said:

"In order to render a dying declaration admissible in evidence, the declarant must, at the time of making the same, be conscious of impending death, and without hope of recovery. This may be shown not only by what the injured person said, but by his condition and the nature and extent of his wounds. Whether, from all the circumstances under which the statement was made, it satisfactorily appears that it was made under a sense of impending death is a question exclusively for the court. We think, considering the statement of Mrs. Lowney, that she believed she was in a dying condition and about to die, and from the mortal nature of her injuries she was aware of the near approach of death, and consequently her statement was made under that sense of impending dissolution that leads to a belief in its truth, and that the court properly admitted it in evidence."

Mrs. Garcia stated in the presence of several witnesses that she was going to die. The wound was quite apparently mortal. There is no suggestion that either deceased or any other person, at the time or afterward, had any hope that she might live.

The instruction tendered by the defendant and refused by that court is as follows:

"You are instructed, gentlemen of the jury, that if a

husband discovers his wife in the act of sexual intercourse with another, or discovers them together in such a position, or under such circumstances as to indicate with reasonable certainty to a rational mind that they are just then committing, or are about to commit, or had just committed, an adulterous act, and, enraged and humiliated for the wrong, kills in the heat of passion either the woman or her paramour, the homicide, on account of the grievious nature of the provocation, is manslaughter only."

This court has made no broader statement of the law in this respect than in *Jones v. People,* 23 Colo. 276, 47 Pac. 275, where it was said, "that the killing of an adulterer, deliberately, and upon revenge, is murder; but where a man finds another in the act of adultery with his wife, and kills him or her in that transport of passion, he is only guilty of manslaughter," and the court so instructed in this case.

But if we were to admit the instruction tendered as a correct statement of the law in the abstract, the testimony did not require that it should be given in this case.

There was no testimony offered tending to show that the defendant found the wife in the act of adultery, or that he discovered her with another man in such a position, or under such circumstances as to indicate with reasonable certainty to a rational mind that they were just committing, or were about to commit, or had just committed an adulterous act.

Sufficient appears from the record to make it probable that theretofore the defendant had information to justify a suspicion, if not a conviction, that his wife had, prior to the time in question, maintained illicit relations with Quintana. But it is well settled that suspicion, or even knowledge, of prior acts of adultery are not sufficient to reduce the offense to one of manslaughter.

The judgment is affirmed.

En banc.

Mr. Justice White and Mr. Justice Teller dissent.

Decided January 7, A. D. 1918. Rehearing denied April 1, A. D. 1918.

No. 9287.

WELSH ET AL. v. STEINBAUGH.

1. CORPORATIONS—*Dissolution—Effect.* A judgment rendered against a dissolved corporation, upon a cause of action arising before dissolution, is valid.

2. —— *Trustees at Dissolution—Duty and Liability.* The statute authorizing a corporation whose charter has expired by limitation to renew the same within one year (Rev. Stat. secs. 891, 892) does not require the trustees holding office at the date of expiration of the charter to postpone action as trustees, under Rev. Stat. secs. 894. They may proceed at once to convert the corporate property into money, discharge its debts, and distribute the residue among the stockholders.

Trustees having conveyed all the properties of the deceased corporation to another, receiving only the stock of the latter, were liable at law to a corporate creditor.

The creditor was not under duty to proceed in equity against the new corporation.

Error to Boulder District Court, Hon. Neil F. Graham, Judge.

Mr. WILLIAM H. DICKSON, Mr. H. E. LUTHE, for plaintiffs in error.

Mr. EDWARD AFFOLTER, Mr. F. G. FOLSOM, for defendant in error.

Chief Justice White delivered the opinion of the court:

THE charter of The Louisville Coal Mining Company, a Colorado corporation, expired by limitation on March 13, 1913, at which time the plaintiffs in error constituted its board of directors. Prior thereto Steinbaugh, the defendant in error here, had instituted a suit in the District Court of Boulder County against that corporation, in which judgment in his favor was rendered on December 17, 1914. It is this judgment that forms the basis of the case now before us. On October 15, 1913, the plaintiffs in error here, as "the board of directors of The Louisville Coal Mining Company and trustees of its creditors and stockholders," sold and conveyed all the property of that corporation to

The Lucifer Coal Mining Company, a Wyoming corporation, and about the same time, as "trustees," executed another instrument of conveyance of the same property to the same grantee. The consideration expressed in each conveyance was "Ten dollars and other good and valuable consideration." The property so conveyed was worth approximately $100,000. Some debts of the dissolved corporation were paid, but not that here involved, though there was sufficient property to produce funds for that purpose. The real consideration for the transfer of the property by the trustees to The Lucifer Coal Mining Company was substantially its entire capital stock, consisting of 130,000 shares of the par value of one dollar per share, together with a like amount of the bonds of such company, all of which was received and distributed by plaintiffs in error, Welsh and Loveland, to the stockholders of The Louisville Coal Mining Company in proportion to their stock therein. Steinbaugh's judgment, remaining unpaid, he prosecuted an action against the plaintiffs in error, as individuals, and as trustees under the statute of the dissolved corporation, and recovered the judgment here involved.

Plaintiffs in error claim that: (1) The judgment of Steinbaugh against The Louisville Coal Mining Company, rendered after the expiration of that corporation's charter, is void; (2) the plaintiffs in error had not become invested with the title to the property of the dissolved corporation at the time they executed the instruments of conveyance thereof to The Lucifer Coal Mining Company; and that, therefore, this company holds such property in trust for the creditors and stockholders of the dissolved corporation, and that the sole remedy of its creditors is by proceeding in equity.

1. The cause of action, resulting in the judgment of Steinbaugh against The Louisville Coal Mining Company, arose prior to the dissolution of that corporation and is, therefore, valid. *The Lucifer Coal Mining Co. v. Buster et al.*, decided at this term of court, 64 Colo. 179, 171 Pac. 61.

2. The alleged invalidity of the sale to the Wyoming company is upon the assumption that as the statute, §§891, 892, Rev. Stat. 1908, authorizes a corporation, under certain conditions, to renew its charter at any time within one year after the expiration thereof, plaintiffs in error had no title to the property or power in the premises until the expiration of such period. The contention is unsound. Upon dissolution by expiration of its charter, plaintiffs in error were, under the facts of this case, invested with the property and possessed of full power to sell and dispose of the same and to settle the affairs of the Louisville Coal Mining Company. §§894, 897, Rev. Stat. 1908. There was nothing which, expressly or impliedly, required the trustees to postpone their action in the premises. Whether, under the peculiar facts of this case, the property could be followed into the hands of The Lucifer Coal Mining Company and impressed with a trust in favor of the creditors of the dissolved corporation, is unnecessary to determine. We are very certain that defendant in error was not required to resort to an action of that character, but had the right to proceed against plaintiffs in error as he did. §894, *supra*. The judgment is affirmed.

Judgment affirmed.

Decision *en banc*.

Decided January 7, A. D. 1918. Rehearing denied March 4, A. D. 1918.

No. 9309.

LUCIFER COAL COMPANY *v.* BUSTER ET AL.

1. CORPORATIONS—*Dissolution—Effect.* Under Rev. Stat. sec. 899 an action may be maintained against a dissolved corporation, upon a cause of action arising before dissolution, and judgment may go against it, notwithstanding the provisions Rev. Stat. sec. 894.

The expressions of the opinion in Kipp v. Miller, 47 Colo. 598, upon this matter are not *dictum*.

2. ——*Stock—How Transferred.* The stockholders' mere bill of sale of the stock does not pass title thereto as against a subsequent attaching creditor.

Error to Boulder District Court, Hon. Robt. G. Strong, Judge.

Mr. WILLIAM H. DICKSON, Mr. H. E. LUTHE, for plaintiff in error.

Messrs RINN & ARCHIBALD, Mr. O. A. JOHNSON, for defendants in error.

Chief Justice White delivered the opinion of the court:

A temporary injunction, upon application of plaintiff in error, was issued against Buster, as sheriff of Boulder county, and Powers, defendants in error, to prevent the sale of certain shares of the capital stock of the Davidson Ditch Company, which had been levied upon by the sheriff under an execution issued upon a judgment of the District Court in favor of Powers and against the Louisville Coal Mining Company, a Colorado corporation. A demurrer to the complaint was sustained, and plaintiff declining to plead further, the action was dismissed. It is alleged in the complaint that the judgment upon which the execution is based was entered January 6, 1915, and that the charter of the judgment debtor therein, the Louisville Coal Mining Company, had expired by limitation on March 13, 1913. By virtue of these facts, it is claimed that the judgment is void and the execution a nullity, notwithstanding the complaint fails to disclose the date of the commencement of the suit the judgment was rendered or when such cause of action arose. Courts assume that judgments of the character of the one here in question are valid until the contrary appears. But, apart from this, it is conceded by the respective parties that the cause of action arose, and the suit was instituted, in 1912, which was prior to the dissolution of the corporation. It has been held that, by virtue of the statute, §899 Rev. Stat. 1908, an action may be maintained against a corporation after its dissolution where the cause of action arose prior thereto. *Kipp v. Miller,* 47 Colo. 598, 108 Pac. 164, 135 Am. St. 236; *Steinhauer v. Colmar,* 11 Colo. App. 494, 500, 55 Pac. 291.

Plaintiff in error, however, claims that the statute does not authorize the conclusion, and that the statements to that effect in the cases cited, *supra,* are *obiter.* We are unable to concur in this view. The point was clearly presented in each case, urged and relied upon in the argument, and passed upon in the opinion. *Newman v. Kay,* 57 W. Va. 98, 49 S. E. 1126, 68 L. R. A. 908, 4 Ann Cas. 39.

It is claimed, however, that as the trustees of a corporation, whose charter has expired, are invested with the title to its property, and charged by law with the administration thereof, a judgment pronounced in an action against such corporation is contrary to the accepted ideas of legal procedure, as it would affect the rights of *bona fide* creditors, without giving them an opportunity to be heard. We are unable to concur in this view. While the existence of corporations, with certain exceptions, may not exceed twenty years, and the term of existence of each must be specified in its certificate of incorporation, §847 Rev. Stat. 1908, other sections, 891, 899, of the statute extend, in substantial effect, such corporate entities for particular purposes. Thus the section in question, in effect, continued the corporate capacity of the Louisville Coal Mining Company *to be sued* for liabilities which accrued before its dissolution. *Singer & Talcott Stone Co. v. Hutchinson et al.,* 176 Ill. 48, 52, 51 N. E. 622. Therefore, its rights as a party to a suit, and of those claiming under it, are the same as the rights of other parties to actions, and there is nothing in the case inconsistent with due process of law.

It is further contended that, notwithstanding the validity of the judgment, the contemplated sale should be enjoined upon the ground that plaintiff in error is the owner of the stock. The claim of ownership is based upon the following facts; subsequent to the expiration of the charter of the Louisville Coal Mining Company, it purported to execute, in its corporate capacity, a bill of sale of the stock to the plaintiff in error, but did not assign or deliver the certificate, as the same had been lost or misplaced. December 30, 1913, plaintiff in error presented the alleged bill of sale

to the Davidson Ditch Company in order that the books of such company "should show the sale, transfer and assignment * * *." The return to the levy of the execution recites that a new certificate was not issued because the plaintiff in error failed to furnish, as requested, a satisfactory indemnifying bond, and that the Louisville Coal Mining Company was then the "record owner and holder" of the stock. The transaction did not constitute a sale of the stock to plaintiff in error as against an attaching creditor. §870 Rev. Stat. 1908; *Central Savings Bank v. Smith,* 43 Colo. 90, 95 Pac. 307; *Farmers' Pawnee Canal Co. v. Henderson,* 46 Colo. 37, 102 Pac. 1063.

The trial court did not abuse its discretion in the premises, and the judgment is affirmed.

Judgment affirmed.

Decision *en banc.*

Decided January 7, A. D. 1918. Rehearing denied March 4, A. D. 1918.

No. 9326.

FOOTE ET AL. *v.* CARROLL.

1. MINING FIXTURES—*Not Part of Realty.* Machinery, belting, attachments, tools and implements, placed upon mining property by one operating under a lease, with an option to purchase, are trade fixtures, and in the absence of any agreement to the contrary may be removed by the tenant at any time during the term, or within a reasonable time after its termination.
2. —— *Subject to Attachment.* The fixtures placed upon a mine by tenant are subject to attachment at the suit of his creditors.

Error to Summit District Court, Hon. Chas. Cavender, Judge.

Mr. FRANK E. PURPLE, for plaintiffs in error.

Mr. JAMES T. HOGAN, for defendant in error. Allen, J.

THE plaintiffs in error, as owners of certain patented mining claims, were intervenors in this case, where material men and laborers brought suit against the lessee on

account of materials furnished to and labor performed for the lessee on the mining claims in question. The plaintiffs attached machinery, appliances, implements and tools which had been sold to and placed by the lessee on the premises for the purpose of carrying on the mining and milling business for which the claims were leased. The intervenors claimed to be the owners of the property thus attached, on the ground, as alleged in their petition, that such property consisted of "fixtures, chattels real, and improvements and part of said real estate and mining properties." This contention was overruled by the trial court. Judgment was rendered against the intervenors and they bring the case here for review and apply for a supersedeas.

Mining, milling and concentrating machinery, implements and tools, belting, attachments, etc., furnished and placed on mining property by a lessee operating the same under a lease, with an option to purchase, for the special purpose of developing the mines, extracting ores and treating the same, and affixed to the premises for the purpose of carrying on the business for which the premises were leased, are trade fixtures, and may be removed by the tenant at any time during the term of the lease, or within a reasonable time after the termination thereof. They do not become a part of the realty nor become the property of the landlord where, as is the case here, the lease does not provide that such machinery and property shall not be removed, and when the same is not furnished as a part of the consideration for the lease and option, to become the property of the landlord at the termination of the lease. They remain the property of the tenant or lessee. *Updegraff v. Lesem*, 15 Colo. App. 297, 303, 62 Pac. 342, and cases cited. The same rule applies between attaching creditors of the lessee and the owner of the fee, as in a case between a landlord and a tenant. Fixtures which a tenant may remove are subject to attachment. 6 C. J. 196; 4 Cyc. 556, note 32. This is but an application of the general rule that all the goods and chattels of a defendant are subject to attachment for his debts. 6 C. J. 195, sec. 351. The

trial court did not misconceive the law. Supersedeas will be denied and the judgment affirmed.

Supersedeas denied and judgment affirmed.

Hill, C. J., and Bailey, J., concur.

No. 8508.

MURRAY v. THE PEOPLE EX REL.

1. CONTEMPT—*Circulating Petition for the Recall of a Judge*, is not Marians v. People, ante, followed.
2. —— *Conviction*—General, Under Duplicate Charge. Conviction of contempt upon two charges, one of which was insufficient in law. There was nothing to show whether the conviction was under both counts, or only one, and if one, which one. Conviction reversed. *Burlington Company* v. *Spriggs*, 50 Colo. 230, followed.

Error to Las Animas District Court, Hon. Robert G. Strong, Judge.

En banc.

Mr. O. H. DASHER, Mr. T. S. MCCHESNEY, for plaintiff in error.

Hon. FRED FARRAR, attorney general, and RALPH E. C. KERWIN, assistant attorney general, for The People.

Opinion by Mr. Justice Teller.

The plaintiff in error was found guilty of contempt in having written and circulated the petition for the recall of Judge McHendrie, which was the basis of the charge in *Marians v. The People*, No. 8509, decided at the last term. There was a further charge that Murray had written a newspaper article containing matter alleged to be defamatory of said judge.

Under the authority of the Marians case, the writing and circulating of the petition must be held not to constitute contempt. The finding was general, and it can not, therefore, be determined whether or not the court held the plaintiff in error guilty under both of the charges, or only under one, and, if but one, which one it was.

This is like a general verdict on two counts, one of which is bad, in which case the judgment must be reversed. *The Burlington & Colorado Railroad Company v. Spriggs*, 50 Colo. 230, 114 Pac. 644.

The judgment is accordingly reversed.

Judgment reversed.

Mr. Justice White not participating.

No. 8702.

SCALA v. MINERS' & MERCHANTS' BANK OF OURAY.

1. PAYMENT—*Forged Endorsement.* A bank may not charge to the depositor an amount paid by it on a forged endorsement of the depositor's check, unless the payment is attributable to some fault of the depositor, or the money has actually reached the person for whom the depositor intended it.

The check was payable to a foreign Consul. The forgery was committed by his clerk. The clerk had for some time been authorized to endorse drafts and like instruments, for deposit. This not having been communicated to defendant, was held immaterial.

2. NEGOTIABLE PAPER—*Description of Payee.* That a check was payable to "The Royal Consulate of Italy", was held not to make it payable to bearer.

Any description of the payee by which he is reasonably identified is sufficient to bring the case within the protection of the rule against payment upon a forged endorsement.

Error to Denver District Court, Hon. Neil F. Graham, Judge.

Mr. GEORGE ALLAN SMITH, for plaintiff in error.

Messrs. DINES, DINES & HOLME, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF in error seeks to recover $661.80 from the defendant bank, upon the theory that it is liable to him for that amount, which it paid out on a check bearing a forged indorsement, from funds then held by the bank to his credit. The defendant received judgment in the court below, and that judgment is here for review.

The facts necessary to be considered are that plaintiff had on deposit with defendant certain funds belonging to an estate of which he was administrator. The amount was evidenced by a certificate of deposit to the order of plaintiff as administrator. It became necessary for plaintiff to remit $661.80 to the Italian Consul, at Denver, and he took the certificate of deposit to the defendant bank to obtain a draft. To save the expense of exchange, he deposited the certificate to his personal credit, and mailed his personal check to the Italian Consul at Denver, payable to "The Royal Consulate of Italy."

The Consul General was away when the letter arrived, and it fell into the hands of a clerk, who forged the indorsement of the "Royal Consul General of Italy," and the name of the Consul, and followed this with his personal indorsement, and deposited it to his own credit in the Interstate Savings Bank, where he had an account, but where the Consul never had done any business. It was by that bank transferred to the First National Bank, Denver, which in turn presented it to defendant, by whom it was paid, and charged to the account of plaintiff. The clerk also forged the name of the Consul General to a receipt for the money and sent it to the County Court of Ouray County, where the estate of Rodigari was in process of settlement.

The peculation of the clerk was not discovered until the return of the Consul General, some three months later, when the defendant bank was notified of the forgery. Later a demand was made upon it for payment, and refused, and this action was brought.

The general rule as to liability of a defendant upon a forged indorsement is stated in 7 C. J. 686:

"As a bank is authorized to pay only to the person designated by the depositor, it can not charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check, unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the

person whom the drawer intended should receive it, or the drawer himself."

This principle is fully recognized and approved in *Boatsman v. Stockmen's Bank,* 56 Colo. 495, 138 Pac. 764, 50 L. R. A. (N. S.) 107. It follows, therefore, unless some circumstance can be found which prevents the application of the general rule, that defendant must be held liable.

It is urged that there are cogent reasons why the rule should not be applied, and the following facts are set up, among others, as making this case an exception, to-wit: That suit was brought by plaintiff as administrator, after he had been discharged as such; that he never had, as administrator, any funds in the defendant bank; that the refusal to pay the check, upon which refusal this suit is based, was refusal to pay a check signed by plaintiff as administrator when he had no account under that designation; that by implication at least the Italian Consul held out his absconding secretary as having power and authority to indorse his name to negotiable instruments; also, that the check bearing the forged indorsement was in reality payable to bearer.

As to whether an action different in form, or with different parties plaintiff or defendant should have been brought may not be considered, for the reason that it conclusively appears from the record, by agreement between the litigants and others in interest, that this action was brought in its present form as a means of definitely determining the liability of each under the circumstances. Also, when the check signed by plaintiff as administrator was presented for payment, the bank had full knowledge that it was presented for the purposes of this suit, and made no objection at that time to the form of the signature. It had knowledge that the funds in question were estate funds, and that plaintiff had drawn the first check for the purpose of transferring the money to a trustee. Therefore, defendant can not now be heard to object to mere questions of procedure, which in no way affect the merits of the case.

There is nothing in the record to support the contention that the clerk of the Consul was ever held out to defendant as authorized to sign the name of his employer to checks or any other papers. While there is testimony to show that the clerk had been, at some time prior to the forgery, empowered to endorse drafts and similar instruments for deposit, the giving of such power was never communicated to defendant.

Neither is there any ground for the contention that the check was payable to bearer. It was drawn to the "Royal Consulate of Italy," and the payee, while not expressly named therein, is manifestly otherwise designated with reasonable certainty. *Esley v. People of Illinois,* 23 Kansas 510; *State of Nevada v. Cleavland,* 6 Nevada 181. This question is discussed in 8 C. J. 171, as follows:

"It has been held that instruments designate the payee with sufficient clearness where payable to the trustees of a particular church, the manager of a particular bank, the treasurer of a certain municipality, the heirs of a named person, the heirs apparent being intended if the person is still alive; the trustees acting under the will of a named person, the trustees to be appointed by a certain convention, the executors or administrators of the estate of a named person; the guardians of a named person; the name of a steamship and 'owners'; 'the estate of' a named person, deceased; or the 'order of the person who shall thereafter indorse' the instrument."

The liability of a bank paying a check upon a forged indorsement was in question in *Goodfellow v. First National Bank,* 71 Wash. 544, 129 Pac. 90-92, reported in 44 L. R. A. (N. S.) 580, and the court, at page 582, held:

"The law imposes upon a bank on which a check is drawn payable to a certain person or order the duty of ascertaining the identity of the person therein named as payee; and it is only when the bank has been misled by some act of negligence or other fault of the drawer that it will be justified in making payment of the check to any other than the

person named therein as payee * * *" (citing numerous authorities).

Among the cases cited by the Washington Court, *supra*, is *Western Union Telegraph Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115. In that case the Court of Appeals, at page 233, said:

"The contract between the bank and the depositor is that it will pay out his money only upon and in accordance with his express direction. A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement, and if the bank mistakes the identity of the payee, or pays upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible."

After most careful consideration of all the facts connected with the transaction upon which this suit is based, we are unable to find anything to take the case out of the general rule, as set out in the authorities quoted. That plaintiff in error has a clear right of recovery, and that the bank is liable for the amount involved, is beyond peradventure. The judgment of the trial court is manifestly wrong and works a great injustice. It is therefore reversed and the cause remanded, with directions to enter judgment for plaintiff, according to the prayer of the complaint.

Judgment reversed and cause remanded with directions.

Decision *en banc*.

Decided February 4, A. D. 1918. Rehearing denied April 1, A. D. 1918.

No. 8781.

BURNHAM LOAN & INVESTMENT COMPANY *v.* SETHMAN ET AL.

1. PROMISSORY NOTE—*Holder in Due Course.* Harrell, president of the German Company, to induce defendant to purchase stock in that company, promised him that if he would make the purchase, executing his promissory note for the amount, due in sixty days, he should be elected treasurer of the company,

and that the company would retain his note, and renew it from time to time, until his salary as treasurer should discharge the amount due thereof.

Sethman, relying upon this promise, executed his note in ordinary form, and delivered it to Harrell, but he was not elected treasurer of the company, and never received the stock. The German Company, by Harrell as president, presently indorsed the note in blank, and delivered to Mitchell, treasurer of that company, and Mitchell thereupon borrowed of plaintiff the sum of $3,000, executing his own note therefor at ninety days, and pledging defendant's note, then still immature, as collateral security. The $3,000 was borrowed to pay commissions on the sale of stock to defendant, and was applied to that purpose, though Mitchell, who was entitled to a share of it, in fact received nothing. Action of plaintiff against defendant upon his promissory note. There was no evidence that plaintiff in accepting the note had notice of any want of consideration or took the note in bad faith in fact. Judgment for defendant reversed and judgment for plaintiff ordered.

2. —— *Bad Faith Defined.* Plaintiffs knowledge, at the time of accepting the note, that Mitchell was treasurer of the payee, inasmuch as in pledging the note he exercised no function of that office, held no evidence of bad faith on the part of plaintiff, and insufficient to warrant any inference thereof.

3. —— *Duty of Inquiry.* One offering negotiable paper fair upon its face, and not due, is under no duty to inquire of the maker as to its validity.

Nor was plaintiff in this case under duty to inquire of the directors of the German Company, as to the right of Mitchell to dispose of the note.

Error to Denver District Court, Hon. James H. Teller, Judge.

Mr. W. E. RICHARDS, for plaintiff in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. WILLIAM H. FERGUSON and Mr. JOHN P. AKOLD, for defendant in error. Garrigues, J.

Statement.

PLAINTIFF below, The Burnham Loan & Investment Company, plaintiff in error, brought this suit, as pledgee, against George H. Sethman, on his promissory note for

$10,002.00, given to the German-American Indemnity Company, in payment for stock, and negotiated and delivered to plaintiff, by one S. N. Mitchell, as collateral security to his note for $3,000.00. The trial court found that plaintiff was not a holder in due course, basing its finding upon a lack of diligent inquiry amounting to bad faith, in accepting the note, and rendered judgment in favor of defendant.

Plaintiff's business was loaning money. One R. A. Ramey, who was its secretary, treasurer and general manager, and had entire charge of the business, made the loan to Mitchell which resulted in this litigation. The business of the German-American Indemnity Company, hereinafter called the Indemnity Company, was writing insurance. One E. C. Harrell was its president and general manager and the by-laws gave him the entire charge and control of all its business. Mitchell was treasurer, but in name only, his duty as such being to pay out money on the order of the president and secretary. He had nothing to do with the books and had no possession or control of the company's notes and bills receivable. He was under contract as the general stock salesman on commission. The by-laws provide that the notes and bills receivable of the company should be kept by the secretary, which office was held by one Doctor Brown. Defendant Sethman was a civil engineer for companies employing workmen, and one Harry Ramey, son of R. A. Ramey, was an insurance solicitor for the Indemnity Company, but was in no way connected with or identified with plaintiff.

March 5, 1912, Sethman went to the Indemnity Company's office in Denver and bought from Harrell, the president, 3,334 shares of the capital stock of the company at $3.00 per share, of the par value of $1.00 per share, amounting to $10,002.00, for which he made, executed and delivered to the company his promissory note, in ordinary form, payable in 60 days. Harry Ramey and one Reid were instrumental in securing Sethman as such purchaser. Harrell, as president and general manager, promised Sethman if he would buy the stock and give the company his

note for the purchase price, that it would retain possession of the note; that the company would issue him the stock, and elect him treasurer, at a salary of $2,500.00 a year; that the duties of the office would not interfere with his usual occupation; that he would not be required to meet the note at maturity, but the company would renew it from time to time, until his salary paid the amount due thereon; that the company desired the names of the various corporations with which he was associated as engineer, and wanted his influence with their workmen to induce them to take out policies of insurance. The stock was never issued to him, and he was not elected treasurer. His note was endorsed by the payee in blank, and delivered by Harrell to Mitchell, who on the 18th applied to plaintiff for a loan of $3,000, and offered the Sethman note so endorsed and in his possession, together with 3,000 shares of the capital stock of the Indemnity Company, standing in the name of Harrell, also endorsed in blank, as collateral security for the loan. Mitchell told Ramey that the note was assigned to him (Mitchell) on account of commissions the company owed him on stock sales. Ramey went to the company's office and inquired of Harrell regarding his authority as president to make the endorsement, and was shown the following by-law, passed when Harrell was elected president, under which the company had been working some two years:

"Duties of President. It shall be the duty of the president to preside at all meetings of the board of directors, to sign all deeds, bonds, certificates of stocks, checks, and documents of any description of the company, and to have general supervision of all meetings, either stockholders' or directors' meetings. It shall be his duty to call all meetings, either regular or special, and the call shall be made in accordance with the by-laws. It shall be his duty to secure the services and fix the remuneration of agents, employes and assistant officers for the general promotion and welfare of the company, and shall have entire charge of the affairs of the company. A suitable compensation, to be determined

by the directors, shall be allowed the president for his services. Motion duly seconded by Mr. Probst and unanimously adopted and the by-laws so amended."

Harrell also told Ramey the note was given for stock sold and delivered to Sethman. After making further inquiry, plaintiff made the loan, and paid out the money on Mitchell's order, taking his note therefor, payable in 90 days, and Mitchell delivered to plaintiff the Sethman note as collateral. While plaintiff made a personal loan to Mitchell, in fact, the money was borrowed to pay agents' advance commission on the sale of the stock to Sethman, for which the note was given, and was used for that purpose. The company agreed to pay its agents 30 per cent commission on the sale of stock, and required them to give 10 per cent of this to Mitchell, as general agent, and he, under some agreement, was to divide this with Harrell. The commission on the Sethman sale was $3,000.00, the amount of the Mitchell loan. Reid and young Ramey were the agents instrumental in producing the purchaser, and on this account each received one-third of the proceeds of the Mitchell loan; the remainder, under their agreement, should have been divided between Harrell and Mitchell, but Harrell overlooked this detail, and Mitchell, as a fact, received nothing out of the loan, though it was made in his individual name. So while ostensibly, and in fact, so far as plaintiff knew at the time, it made a personal loan to Mitchell, the company received and used the money to pay these agents.

There is no evidence plaintiff had knowledge of any defense the maker had to the note, and no evidence that it had actual knowledge of any defect in Mitchell's title. After Mitchell failed to pay his note, plaintiff had several interviews with Sethman about the payment of his note, and finally Sethman declared that it had been obtained by fraud; that there was a want of consideration, and that he would pay nothing upon it. Thereupon this action was instituted.

The Pleadings.

The complaint alleges that March 5, 1912, Sethman made and delivered his promissory note for $10,002.00 to the Indemnity Company, payable 60 days after date; that the Indemnity Company indorsed in blank, negotiated and delivered it to Mitchell, and on March 18, 1912, for value, he negotiated and delivered it to plaintiff, who is the holder in due course. The answer pleads failure and want of consideration, of which, it is alleged, plaintiff had notice, and also alleges a defect in the title of the person negotiating it to plaintiff, of which, it is alleged, it had notice; that plaintiff did not take the note in good faith and is not a holder in due course; that plaintiff, in making the loan, advanced the money to the Indemnity Company, to be used in paying obligations to its agents. The replication denies knowledge of any defense the maker had to the note; denies knowledge of any defect in the title of the person negotiating it; denies that plaintiff advanced the money to the Indemnity Company, and alleges as the transaction: That March 18, 1912, plaintiff loaned Mitchell. $3,000.00; that he made and delivered to it his promissory note therefor, payable in 90 days, and as security deposited with plaintiff the Sethman note, and prays that its recovery be limited to the amount due on the Mitchell note. July 20, 1914, after judgment entered and after the term of court had expired, without notice to plaintiff, and without leave of court first had and obtained, defendant filed an answer, in which it is alleged that Mitchell had no authority to pledge the note; that he pledged it to plaintiff as collateral security for a loan plaintiff made to him personally, at a time when plaintiff knew he was treasurer of the company, and knew, or should have known, that he had no authority to pledge company property as security for his personal loan, and that his title was therefore defective.

The Statute.

Our commercial code, passed in 1897, provides:

Sec. 34. "An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

Sec. 52. "A holder in due course is a holder who has taken the instrument under the following conditions: * * * 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any * * * defect in the title of the person negotiating it."

Sec. 55. "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud."

Sec. 56. "To constitute notice of * * * defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of * * * the defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Sec. 57. "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Sec. 58. "In the hands of any holder, other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. * * *"

Sec. 59. "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

GARRIGUES, J. (After stating the case as above.)

1. It is claimed plaintiff is not a holder in due course because: (a) It took the note with notice of the defense the maker had, of want or failure of consideration. (b) It did not take the note in good faith. (c) That plaintiff took the

note with notice of defect in the title of the person negotiating it—Mitchell.

The defenses interposed are controlled entirely by the statute. There is not a particle of evidence that plaintiff had notice of want or failure of consideration; neither is there any evidence that it took the note in bad faith in fact. Bad means evil, something vicious. Bad faith in fact, or *mala fides*, is the opposite of good faith, and consists in guilty knowledge, or willful ignorance, showing a vicious or evil mind, evidence of which is totally lacking in this case. The evidence shows that plaintiff, in making this loan and accepting the collateral, acted in the utmost good faith. There is no evidence to the contrary. The court made no finding of actual bad faith, or actual knowledge of a defective title, or that plaintiff possessed knowledge of any defense the maker had to the note; if it had, its action in doing so would have been arbitrary, unwarranted and unsupported by any evidence, or the result of a mistake.

Plaintiff must be a holder in due course, and paragraph 4, section 52, is controlling as to when one is such a holder. If it took the instrument with actual or constructive notice of defect in the title of the person negotiating it, it is not a holder in due course. The statute removes any uncertainty or doubt as to what constitutes a defective title, and also what shall be notice thereof. Section 55 defines a defective title. We will assume for the purpose of this branch of the case that Mitchell negotiated the note under circumstances amounting to a fraud upon the Indemnity Company, which made his title defective. But did plaintiff have notice of such defect? Section 56 provides that to constitute notice of such defective title, the person to whom the note is negotiated must have actual knowledge of such defect, or knowledge of *such facts* that his action in taking the instrument amounted to bad faith. There is no evidence of actual knowledge, and no such finding was made by the court. If plaintiff had no actual knowledge, but had knowledge of "such facts" that its action in taking the note amounted to bad faith, it had constructive notice of Mitch-

ell's defective title, and under the statute would not be a holder in due course, of which defendant could take advantage.

It is claimed by defendant that Mitchell, in negotiating the security, was appropriating property of the company to his own personal use. If true, this would amount to a fraud on the company, and his title, under section 55, would be defective. Assuming it was defective, it is as necessary that plaintiff should have notice of such defect as it is that the title should be defective. It is claimed plaintiff had knowledge of *such facts* that its action in taking the instrument amounted to bad faith, which constituted notice of the defective title. What were the facts proven on the trial, of which plaintiff had knowledge, that made its action in taking the note amount to bad faith? The claim is: Because plaintiff knew that Mitchell was treasurer of the Indemnity Company. Mitchell exercised no function of this office in pledging the note. Bad faith is an inference drawn from the fact that he was treasurer of the company, but the evidence must warrant such an inference. The mere knowledge that Mitchell was treasurer was not knowledge of "such facts" under the undisputed evidence of this case as would justify the deduction that plaintiff's action in taking the note amounted to bad faith, and the court was not warranted either, as a matter of law or fact, in making such deduction. Whether its action in taking the note with such knowledge would warrant the inference of bad faith under section 56 is a question of law. Where, as here, there is no conflict in the evidence regarding knowledge of *such facts,* whether plaintiff's action in accepting the security amounted to bad faith, rests upon a legal inference drawn from the knowledge that Mitchell was treasurer. Such knowledge does not constitute bad faith in fact, and it would be idle to contend that it constituted bad faith as a matter of law, or that it warranted, in this case, the inference of bad faith. The finding of the court was nothing more than a deduction as to the effect of the knowledge of "such facts," and this is a question of law. No doubt an

inference of bad faith may be drawn, if warranted, as a deduction by the court or jury, and where there is sufficient evidence to warrant or justify it, the inference when made becomes proof as a fact of bad faith, and a court of review would not interfere with the finding; but there must be sufficient legal evidence to warrant such inference. There is no evidence of bad faith in fact, and because plaintiff knew that Mitchell was treasurer of the Indemnity Company was insufficient in law to warrant the inference of bad faith. *Merchants Bank v. McClelland,* 9 Colo. 608-611, 13 Pac. 723; *Coors v. German Nat. Bank,* 14 Colo. 202-206, 23 Pac. 328, 7 L. R. A. 845; *Tourtelotte v. Brown,* 1 Colo. App. 408-417, 29 Pac. 130; *Colomon v. Brodie,* 10 Colo. App. 353-359-360, 50 Pac. 1045; *Wedge Co. v. Denver Bank,* 19 Colo. App. 182-189, 73 Pac. 873; *German-American Co. v. State Bank,* 26 Colo. App. 242, 142 Pac. 189; *Montvale v. Peoples Bank,* 74 N. J. L. 464, 67 Atl. 67; *Fillebrown v. Hayward,* 190 Mass., 472-480, 77 N. E. 45; *Rockville Bank v. Citizens Co.,* 72 Conn. 576-582-583, 45 Atl. 361; *Kaiser v. U. S. Bank,* 99 Ga. 258, 25 S. E. 620; *Doe v. N. W. C. & T. Co.,* 78 Fed. 62, 68-69; *Kaiser v. First Nat. Bank,* 78 Fed., 281-284, 24 C. C. 88; *Farmers Co. v. Madison Co.,* 153 Fed. 310-319.

2. That the rule of law contended for by defendant does not prevail in this state is shown by the citations. We have adopted and are following the federal rule in this regard. But even if the rule relied upon by defendant prevailed here, the facts in this case do not bring it within the rule. In the class of cases supporting the rule contended for, the party accepting the security from the company officer, for a personal loan, could see upon the face of the transaction that the officer, by exercising the function of his office, was at the same time using the security belonging to the company for his own personal benefit; that is, that it was in connection with, or by his act, as an officer, that he was appropriating company property to his own use. Using this case as an illustration, it would be the same as though Harrell, in his official capacity as

president, endorsed the company's name on the Sethman note, and offered it to plaintiff so endorsed as security in connection with his application for a personal loan, in which event plaintiff could see that the president and general manager, with power to endorse the company's name, was exercising a function of his office and at the same time using the security endorsed by him for his individual purpose. This case is very different. The note had been regularly endorsed by the company, by its president, authorized so to do by the by-laws, and delivered to Mitchell. Plaintiff found Mitchell in the possession of such endorsed paper. Mitchell did not exercise any official act in negotiating and delivering the note, and had nothing to do with the endorsement. It had already been endorsed by the company and delivered to him. Upon inquiry as to the president's right to endorse the company's name upon the note, plaintiff was shown the by-law giving the president entire control of the business affairs and management of the corporation, and was informed that the note had been delivered to Mitchell on account of commissions on the sale of stock. Mitchell exercised no function of his office as treasurer in connection with the loan.

3. The court based plaintiff's knowledge of *such facts* that its action in taking the note amounted to bad faith, constituting notice of Mitchell's defective title, upon plaintiff's lack of diligence in making inquiry as to Mitchell's right to use the note; that is, that plaintiff was guilty of negligence in not making diligent inquiry, which amounted to bad faith under section 56, constituting such notice. Plaintiff was under no obligation to inquire of the maker of the note; if so, no one could ever purchase negotiable paper, and be a holder in due course, without first making inquiry of the maker. Inquiry, if necessary here, was as to the title of the person negotiating the instrument. The court found plaintiff failed to use due diligence in making such inquiry. This was in effect a finding of knowledge of facts amounting to bad faith in taking the instrument, constituting notice of such defective title. There is no con-

flict in the evidence in this regard as to what was or was not done. Plaintiff did make inquiry. It went to the office of the company, where it found the president and general manager, and upon inquiry was shown the by-law passed by the board, which gave the president the entire charge and management of the affairs of the company. This showed ample authority to endorse the company's name upon the note, and there was evidence that Harrell had been exercising such authority. There is no evidence or absence of evidence upon which the court could properly base a finding of lack of diligence, unless it be that plaintiff failed to inquire of the board of directors. The court seems to have entertained the idea that it was plaintiff's duty to inquire of the board of directors as to Mitchell's right to use the endorsed note. We know of no such duty, and we think under the evidence in this case that plaintiff was charged with no such inquiry. Where the evidence is not conflicting in this particular and there is insufficient evidence to warrant a finding of lack of diligence in making such inquiry, a finding that plaintiff's action in taking the note amounted to bad faith can not be sustained as a matter of law.

4. Defendant thought he was getting 3,334 shares of valuable stock for practically nothing. Instead of protecting himself in such adventure, he gave an ordinary 60-day negotiable note, with interest from date, and shortly thereafter the payee endorsed it in blank, negotiated and delivered it to Mitchell, who applied to plaintiff for a loan and negotiated and delivered it to plaintiff as security. The evidence shows without conflict that plaintiff took the note in good faith for a valuable consideration, before maturity, without notice of any defense the maker had, and without notice of any defect in the title of the person negotiating it. Defendant could easily have protected himself by a proper wording of the note. Instead of this, he made it possible for his negotiable paper to pass into the hands of an innocent purchaser, and he, instead of plaintiff, should suffer the loss.

The judgment is reversed and the cause remanded to the lower court, with directions to enter a judgment in favor of plaintiff in accordance with the views herein expressed.

Reversed and remanded with directions.

Decision *en banc*.

Mr. Justice Teller not participating.

Chief Justice Hill dissents.

Decided February 4, A. D. 1918. Rehearing denied April 1, A. D. 1918.

No. 8786.

FORD v. TOWN OF MEEKER.

1. PUBLIC WORK—*Payment to Contractor For.* A town having agreed with the contractor for certain public works, after the completion of the works, as to the amount due him, and the time and conditions of payment, it was held a waiver of the provisions of Rev. Stat. sec. 5407.
2. STATUTE—*Waiver of.* Sec. 5407 of the Revised Statutes provides that before any payment shall be made to a contractor for public works the contractor shall present to the trustees of the town a statement in writing showing the amounts owing by him for labor, etc. The town having, after the completion of the works entered into a contract with the contractor as to the balance due him, and the time and conditions of payment, an action was brought by the contractor, under this contract. *Held* the contract waived the provisions of the statute.
3. NON-SUIT—*Grounds of.* A non-suit is not to be granted for the omission of plaintiff to establish the converse of an affirmative defense pleaded by defendant.
4. ——*Motion for—Effect.* Defendant's motion for a non-suit admits the truth of the evidence produced on the part of the plaintiff, and every legitimate inference therefrom, interpretated most strongly against defendant.

Error to Rio Blanco District Court, Hon. John T. Shumate, Judge.

Mr. BERNARD J. FORD, Mr. T. E. MCINTYRE, for plaintiff in error.

Mr. JOHN R. CLARK, Mr. E. B. FOWLER, Messrs. DOUD & FOWLER, for defendant in error.

Opinion by Mr. Justice Allen:

The plaintiff in error, P. P. Ford, built a system of water works for the defendant in error, the town of Meeker, under a contract entered into on January 2, 1906. Prior to July 17, 1907, the town made payments to the contractor, the plaintiff in error, on account, and under the construction contract. On the date last mentioned a settlement and agreement as to the balance due from the town of Meeker to the plaintiff in error was had between the parties, and an account was then stated between them. This statement, account stated, and agreement was in writing, and is as follows:

"It is hereby agreed by and between the Board of Trustees of the Town of Meeker, party of the first part, and P. P. Ford, contractor of the water works system, party of the second part:

First. That the water works system constructed by said second party for said town under contract dated January 2, 1906, is accepted by said town, except as to the hydrants and gate at intake, which said contractor agrees to complete under said contract within one month from the date of this agreement.

Second. That there is due said contractor from said town under original contract the sum of twelve thousand one hundred seventy-two and 98/100 dollars ($12,172.98).

Third. That there is due said contractor from said town for extras over and above said contract price the sum of one thousand nine hundred and forty-nine and 18/100 dollars ($1,949.18), making a total due said contractor from said town of fourteen thousand one hundred and twenty-two and 16/100 dollars ($14,122.16).

Fourth. That of said total amount ten per cent of forty-five thousand dollars, or four thousand five hundred dollars ($4,500.00), is to be retained by said town for one month for replacements and repairs.

Fifth. That there shall also be retained intact by said

town the sum of four thousand seven hundred thirty-one and 88/100 dollars ($4,731.88), claimed as due from said contractor to the Washington Pipe & Foundry Company of Tacoma, Washington, until satisfactory adjustment of said claim is made between said contractor and said company.

Sixth. That the said contractor be now paid by said town the sum of four thousand eight hundred ninety and 28/100 dollars ($4,890.28).

Seventh. That the said ten per cent above retained be paid to said contractor one month from date, less such sums as may have been expended for necessary replacements and repairs, and such claims as may be filed against said contractor.

In witness whereof, said parties have hereunto set their hands and seals, this 17th day of July, A. D. 1907, the said town signing by its mayor, he being thereunto duly authorized by resolution of Board of Trustees of said town of even date herewith.

The Town of Meeker,
(Seal) By Lee Peterson, Mayor.
Attest: P. P. Ford.
T. B. Scott, Town Clerk."

At the time of the making of this contract of July 17, 1907, the town paid Ford the sum of $4,890.28, as agreed in paragraph Sixth of the contract, and on September 5, 1907, the town paid the contractor the further sum of $3,000.

This action is brought on the contract of July 17, 1907, by the contractor, the plaintiff in error, plaintiff below, to recover the sum of $6,231.88, alleged to be due under the contract last mentioned including the sum of $4,731.88 mentioned in paragraph Fifth thereof. The last named sum is claimed by the plaintiff upon the ground that it was wrongfully paid over by the town to the Washington Pipe & Foundry Company. The complaint also contains a second cause of action wherein the plaintiff seeks to recover the sum of $105 for certain material alleged to have been delivered to and accepted by the town.

Upon trial, and at the close of the plaintiff's evidence, the trial court granted the defendant town's motion for a non-suit, and the sustaining of such motion is assigned as error.

As to the first cause of action, the same relating to plaintiff's demand under the contract of July 17, 1907, the ground of the defendant's motion for a non-suit is, that the plaintiff contractor failed to prove or to allege that he filed with the town of Meeker the contractor's verified statement, provided for by section 2, chapter 124, Session Laws, 1899. The statute in question, sec. 5407 R. S. 1908, sec. 6051 Mills Ann. Sts. 1912, provides that:

"Before any payment shall be made to the contractor as may be provided for in the contract for the construction of such public works, the contractor shall present to the * * * trustees of towns * * * a statement in writing showing the amounts owing by him for labor performed or materials furnished, and the names of the persons to whom such sums are due. * * *"

The plaintiff is not suing upon the contract of January 2, 1906, which was a contract for the construction of a public work, but has brought an action upon the contract of July 17, 1907, which is an agreement fixing the amounts due under the original contract and providing when and under what circumstances such amounts shall be paid.

The contract upon which the suit is brought discloses an intention to depart from the rule of law created by the above quoted portion of the public works statute. This being true, the rule that a contract should be construed as though the provisions of the law were written in it does not apply. 6 R. C. L. 855, sec. 243. The statutory provision as to the contractor's verified statement was waived or dispensed with by the town when it entered into the agreement sued on. The waiver is apparent from several features of the contract. It nowhere requires, or even mentions, a verified or any statement from the contractor. In paragraph numbered Sixth it is agreed that the contractor "be now paid" $4,890.28. No conditions precedent are pre-

scribed for this payment. This discloses an intent to waive the statutory requirement. The claim of the Washington Pipe & Foundry Company is provided for in paragraph numbered Fifth. The reference to this claim and the absence of any mention of any other claim or claimant implies that the parties understood that there were no other claims of sub-contractors, laborers or material men of which they, or either of them, had knowledge. If such was their understanding, a verified statement by the contractor, as provided by the statute, would not and could not show "the names of the persons to whom such sums are due," and the statement would not subserve any useful purpose. An agreement between the town and the contractor as to the items of claims outstanding against the latter was the equivalent, at least so far as the town is concerned, of the statement called for by the statute. The provisions of paragraphs numbered Fifth and Seventh indicate that the town intended to and did protect itself and also claimants in thus waiving the statutory requirement. This is an additional reason for holding that the contract waives the requirement as to the contractor's statement, and that it would be contrary to the intention of the parties and inconsistent with the language of the contract to hold that the statutory provision in question is embodied in the contract.

For the reasons above given, the trial court erred in sustaining defendant's motion for a non-suit as to the first cause of action.

Error is assigned to the trial court's sustaining defendant's motion for a non-suit as to plaintiff's second cause of action. The motion was made upon at least four distinct grounds. The court in sustaining the motion did not indicate what grounds were well taken. One of the grounds assigned relates to a requirement of an ordinance as to the presentation of claims, and is practically a repetition of an affirmative defense which is pleaded by the town in its answer. There is clearly no reason for sustaining the motion on such ground. The remaining grounds are to the effect that plaintiff failed to show that the town contracted for,

purchased, ordered, accepted or used the material left by him at Meeker. The plaintiff testified that the material was delivered to and accepted by the city marshal and one member of the committee, representing the town, that had made the "settlement," evidently referring to the contract sued on in the first cause of action. The material, consisting of pipe, was measured up, and the parties acting on behalf of the town agreed to take it at the price of $105. A motion for non-suit admits the truth of plaintiff's evidence and every inference of fact that can legitimately be drawn, and on such motion the evidence will be interpreted most strongly against defendant. 38 Cyc. 1551. The plaintiff's evidence made out a *prima facie* case. The defendant offered no testimony. Under these circumstances we deem it was error to sustain the motion.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Decision *en banc*.

No. 8802.

COOKMAN v. CALDWELL.

DAMAGES—*Personal Injury—Future Suffering.* Action for assault and battery. The plaintiff relied solely upon her own testimony, and failed to show with reasonable certainty that she would in the future indure suffering as a result of the assault. An instruction that the jury should consider the probable effect "of the injury upon plaintiff's future health and strength" was held error.

Error to Lincoln District Court, Hon. J. W. Sheafor, Judge.

Messrs. HAYT, DAWSON & WRIGHT, for plaintiff in error.

Mr. LOUIS VOGT, Mr. C. B. HORN, for defendant in error.

Opinion by Mr. Justice Allen.

This is an action wherein the plaintiff below brought suit against the defendant below for damages sustained by reason of an alleged assault and battery.

The only question necessary to be considered upon this review is whether or not the evidence was sufficient to warrant an instruction wherein the jury are told that in determining the amount of damages which the plaintiff shall recover, they should consider "the probable effects" of the physical injuries sustained upon plaintiff's "future health and strength."

No testimony was submitted on behalf of plaintiff except that of herself. She testified, so far as concerns the question under consideration, to the following effect: That the assault and battery was committed on March 5, 1915, about one month prior to the time of trial. That while plaintiff was sitting in a rocking chair the defendant grabbed her by the arm and jerked her out of the chair; that he then threw her against a door casing; that her shoulder struck the door casing; that the defendant then shoved her in the back with his hands; and that the striking of her back sprained it, and her head hurt after that. The plaintiff testified further, as follows:

"The next morning after the occurrence my shoulder was all swollen up. Since that time, whenever I try to lift or do any washing or anything, my arm swells up and my back hurts; up and down the spine; and I get nervous at those times."

Enough of the evidence has been herein set forth to show plaintiff's strongest, and substantially all, testimony on the matter in question. We are of the opinion that this evidence was insufficient to warrant the instruction given.

An examination of many cases where the evidence was held to be sufficient to authorize an instruction permitting a recovery for future pain and suffering, discloses that in most of such cases the injuries received were of such nature that the injured person must of necessity undergo pain and suffering in the future.

It may be said in the case at bar as is stated in *Shawnee-Tecumseh Traction Co. v. Griggs,* (Okla.) 151 Pac. 230:

"The only evidence of present pain was given by the plaintiff herself, and she could not, with reasonable cer-

tainty, testify that she would suffer, and most certainly she could not say how much she would suffer, in the future (*Atlanta St. R. Co. v. Walker,* 93 Ga. 462, 21 S. E. 48); and the injuries complained of were not such as would warrant the jury in inferring that she would suffer pain in the future, all of the injuries being plainly subjective. Evidence by experts that there would, to a reasonable certainty, be future pain and suffering is wholly lacking in the case."

In the case at bar there was no evidence of a patent physical fact, such as the loss of a limb or any other physical impairment, that would by observation be apparent to the jury, and show that the plaintiff had received a permanent injury or would necessarily suffer pain for some period of time, or would be affected in health and strength, in the future. The evidence did not show to a reasonable certainty that the plaintiff would endure pain and suffering in the future as a result of the assault and battery complained of. The testimony of the plaintiff was all concerning a latent injury which was not apparent, and would leave the jury to conjecture whether or not it would affect her future health and strength. The facts narrated by plaintiff were not such that, as a matter of common knowledge, some future pain and suffering would be inevitable. "Pain and suffering which are merely possible and speculative are, of course, not to be considered." 8 R. C. L. 544, sec. 94.

"The evidence, to justify a recovery of damages because of future pain and suffering, must be so certain and definite that its existence is not left to the mere imagination or guess work of the jury." 13 Cyc. 216, and cases collected in note 33.

The evidence was insufficient to warrant the instruction complained of. The jury allowed plaintiff $500 damages. Such sum would suggest that a part of the recovery was allowed on account of impairment of health and strength in the future. In the language of the opinion in *Miller v. McConnell,* 23 S. D. 137, 120 N. W. 888, it may be said, "it is no answer to say that the defendant could not have been harmed by the reason that there was no evidence competent

from which the jury could have inferred that there might be further suffering. * * * The mere giving of such instruction might tend to lead the jurors to suppose that they had a right to presume that there would be such suffering * * * from the mere fact that there had been suffering, and plaintiff had sworn that the suffering continued up to the time of the trial. It is impossible for this court to determine whether this instruction affected the verdict, but we must presume that it did."

For the reasons above named the judgment is reversed and the cause remanded.

Reversed and remanded.

Decision *en banc*.

Hill, C. J., dissents.

No. 8809.

KILPATRICK v. THE PEOPLE.

1. CRIMINAL LAW—*Non-Support of Wife*. The husband is not liable to prosecution under c. 179 Laws 1911, where the wife has left him without reasonable cause, and without cause, refuses to return to him.
2. —— *Divorce—Allowance of Temporary Alimony—Effect*. An allowance of temporary alimony to the wife in an action brought by her for divorce, is not admissible in evidence against the husband, in a prosecution for non-support.
3. —— *Evidence*. A judgment in a civil action is not admissible in a criminal prosecution against one of the parties thereto, to establish the facts upon which the judgment was based, even though the civil action involves the identical question in issue in the criminal prosecution.

Error to Larimer County Court, Hon. Fred W. Stover, Judge.

Mr. WM. H. DICKSON, Mr. FORREST L. NICOL, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. BERTRAM B. BESHOAR, Assistant Attorney General, for The People.

Opinion by Mr. Justice Allen:

THE plaintiff in error, defendant below, was prosecuted under the non-support statute (Chapter 179, Session Laws

1911). The information was filed October 7, 1915, and alleged, in substance, that on or about December 5, 1914, "and from thence continually until the day of the date hereof," the defendant willfully neglected, failed and refused to provide reasonable support and maintenance for his wife and child. Upon the trial the jury rendered a general verdict of guilty.

The evidence shows that the defendant and his wife were married in Denver in March, 1911, and then moved to Craig, Routt County, where they resided and lived together until March, 1914, and where the defendant continued to reside. On or about March 26, 1914, the wife left her husband's home in Craig, and came to Ft. Collins, Larimer County. She did not thereafter return to Craig, but resided in Larimer County, separate and apart from her husband, ever since.

Upon cross-examination, the wife testified that the reason she left Craig at the time she did was "because mother was sick," and that during the time the parties lived together, her husband, the defendant, provided for her support and the support of the child. The testimony shows that on three different occasions after the separation, the defendant came to Larimer County and tried to get his wife to come back with him to their home in Routt County, which she refused to do.

The defendant testified that his wife at the time she left Craig to visit her mother at Ft. Collins did not say she was not coming back, and that prior to that time she never intimated that she was going to leave, and also that the first intimation he got that she was not coming back was about eight or ten days after she left, when he received a letter from her from Ft. Collins.

The trial court refused to permit the defendant to show what reason his wife at that time gave for not coming back, and also what reasons she gave for not going back to Craig when he came to Larimer County to ask her to go back home with him. The defendant was not permitted

to show what he did to get his wife to return to Routt County.

Counsel for the defendant sought on cross-examination of the complaining witness, the wife, to show why she never returned to Craig. Such examination proceeded but a short ways when counsel for the people objected "on the ground that it is immaterial," etc., and the objection was sustained by the court. Later on counsel for defendant was pursuing a line of inquiry in cross-examining the witness, and upon objection being made by the prosecution, informed the court that "the purpose of this is to show that she left the defendant without reasonable excuse." The trial judge in sustaining the objection, remarked, "I think it is wholly immaterial as to the reasons."

The trial court also refused to permit counsel for defendant to show on cross-examination of the complaining witness that she could at any time return to Craig and have support from her husband.

In accord with its rulings on the admissibility of testimony, the court instructed the jury, "that the question whether or not the wife was justified in leaving her husband is immaterial so far as the issues of this case are concerned."

Assignments of error are predicated upon the foregoing instruction and upon the court's rulings on evidence above indicated.

At common law the husband is not required to contribute to the support of his wife where she without just cause refuses to live with him. 21 Cyc. 1152. Our statute provides that, "any man who shall willfully neglect, fail or refuse to provide reasonable support and maintenance for his wife," etc., "shall be deemed guilty of a felony." Similar language in the statutes of other states has been treated in numerous cases as not implying or adding any further obligation upon a husband in addition to that resting upon him at common law. The non-support statutes have been regarded only as enforcing, and not as creating, a duty

on the part of husbands and fathers with reference to the support of wives and children.

In *People v. DeWolf,* 118 N. Y. S. 75, the accused was convicted under a criminal statute declaring a person who shall neglect to provide for his wife, according to his means, a disorderly person, and it was held that a conviction is not sustainable where she left him without adequate excuse. In *People v. Pettit,* 74 N. Y. 320, it was held, under the same or a similar statute, that the husband is not guilty of neglecting to support his wife if he offers to support her if she will live with him, and she refuses because of alleged fear of personal violence without having a reasonable and substantial apprehension of violence, based upon sufficient facts. In *People v. Flewellyn,* 111 N. Y. S. 621, the court said:

"In the case at bar, inasmuch as the defendant is ready and willing to support her if she will go with him away from her people as the evidence shows he is, then she should go with him."

The court then held that the evidence failed to show that the defendant was guilty under the information which included a charge that he neglected to provide for his wife.

In the case of *Spencer v. State,* 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969, an instruction of the trial court is quoted as follows:

"It is the reciprocal duty of the wife to live with the husband on his providing, or offering to provide a suitable home and suitable support for her. She may not, on his so offering, refuse to live with him in such home and still look to him for support, and if she does so refuse he is then under no legal obligation to provide for her."

An instruction quoted in *Jenness v. State,* 103 Wis. 553, 79 N. W. 759, reads, in part:

"* * * and if, without legal excuse, she abandons her home, or unreasonably refuses to live with her husband, she forfeits her rights to his support. * * * When she offers to live with defendant and discharge her conjugal duties,

she will then be in a position to invoke the law to compel him to perform his duties if he refuses to do so."

The foregoing quotations appear to us to state the law applicable in criminal prosecutions under our non-support statute.

In the case at bar the defendant was entitled to be permitted to show, and the jury to consider, whether or not he was willing, and in good faith offered, to support his wife at his home in Routt County, during the time named in the information, and also whether or not the wife left his home, and refused to return to the defendant without any reasonable excuse. Under the rulings and instruction of the trial court these matters could not be shown or considered. If it had been established that the wife left the defendant without an adequate excuse, refused without reasonable grounds to return to him, and he offered and was willing to support her if she returned, he could not be convicted of wilful non-support of his wife. As said in *Hopkins v. State,* 126 Wis. 104, 109, 105 N. W. 223, "the question whether the wife's conduct was such as not to make it criminal for him to refuse or neglect to furnish such support was a question of fact for the jury, under proper instructions from the court." The rulings on evidence and the instruction, hereinbefore mentioned, therefore constituted prejudicial error.

Over the objection of the defendant, the prosecution was permitted to introduce in evidence a temporary alimony order entered by the same court on December 19, 1914, in a divorce proceeding wherein the defendant and his wife were parties. Error is assigned to the introduction of this order, and will be considered for the reason that the temporary alimony order in question was the basis of the trial court's refusing to permit the defendant to show the matters tending to establish a defense, hereinbefore discussed. The trial judge in ruling upon the evidence, as above shown, made the following remarks:

"I take the view in this particular case that since the court has by order fixed a status of the parties as to sup-

port, that is that the defendant in another action which happens to be in this court, has been ordered to support his wife and child here; I don't see how any offer to support her elsewhere would make any difference, because that has been fixed and determined. * * * the matter before us now is why he has not supported her here, as ordered by the court."

* * *

(This prosecution) is based upon the status established by that order. * * * the status of the parties as to support, place, amount, and so on, has been fixed by this court."

The errors hereinbefore pointed out were not cured by the introduction in evidence of the order for temporary alimony in the divorce proceeding, but an additional error was committed in permitting the order to be so introduced. the defendant was, in the case at bar, on trial for an alleged felony, and the state was required to prove its case beyond a reasonable doubt. 21 Cyc. 1615. As a defense, the defendant was entitled to show, if he could, that the prosecuting witness without adequate excuse left the matrimonial domicil of the parties, and then without any reasonable cause remained away from the home provided for her by the defendant, and where he would be willing to receive and support her. The trial court held that the temporary alimony order "established a status between the parties," as to support and place of support. The temporary alimony order did not, however, fix the status of the parties so far as this criminal action is concerned. The order recites that it is made "on motion of the plaintiff." Had the motion been denied the defendant could take no advantage of it in this proceeding, and likewise the prosecution cannot prove the status of the parties by introducing in evidence the temporary alimony order.

In *Comm. v. Simmons,* 165 Mass. 356, 43 N. E. 110, it was held that on the prosecution of one for non-support, a decision in a divorce suit by such person, denying the wife's motion for alimony *pendente lite,* is not admissible.

The reason for such holding is applicable in the case at bar. The court in the case above cited said:

"These prosecutions under (the non-support statute) * * * are independent of the proceedings for a divorce, and are to be tried and disposed of upon the facts appearing upon the allegations contained in them. The decision of the superior court upon the question whether it would order the payment of alimony *pendente lite* did not determine the status of the parties, and did not settle the question whether it was the duty of the defendant to support his wife and children under the circumstances then existing. Moreover, the parties in that suit were not the same as in this, and for that reason the evidence was incompetent."

The status as fixed by the temporary alimony order was not settled even in the divorce proceeding. The order was subject not only to modification but also to vacation. 14 Cyc. 760. Even if regarded as settled, the status in the divorce case was determined upon a mere preponderance of the evidence, while in a criminal prosecution the status, if material, must be proven beyond a reasonable doubt. It would be unjust to the defendant in this case to regard the status as conclusively settled or as already proven beyond a reasonable doubt, merely because the court, in a civil action, fixed the status so far as that may be done by an order for temporary alimony. Reasons for this conclusion sufficiently appear in the authorities cited below.

"The general rule is that a judgment in a civil action cannot be given in evidence in a criminal action to establish the facts on which it was rendered." *State v. Weil,* 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461.

"A judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail. It would not be just to convict a defendant by reason of a judgment obtained against

him civilly by a mere preponderance of the evidence." ——, 15 R. C. L. 1004, § 480, citing *State v. Bradnack*, 69 Conn. 212, 37 Atl, 492, 43 L. R. A. 620; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; and note in 103 Am. St. Rep. 23.

For the errors above named the judgment is reversed and the cause remanded.

Reversed and remanded.

Decision *en banc.*

No. 8837.

CITY OF DELTA *v.* CHARLESWORTH ET AL.

1. MUNICIPAL CORPORATION—*Ordinance—Presumptions.* An ordinance within the powers granted to the municipality is presumed to be reasonable, unless the contrary appears upon its face.
2. ——*Reasonableness of Ordinance.* An ordinance enumerating many places where men usually assemble or pass, provided that no person "shall drink" certain designated intoxicating liquors, while in any of these places "unless the person occupying the building be duly licensed by the city to sell, etc." held that the manifest purpose of the ordinance is to prevent the drinking of intoxicating liquors in public view, and particularly of children and youth, and thus improve the public morals; that including all of the places of the classes designated, it is therefore authorized by Rev. Stat. sec. 6669.
3. STATUTES—*Construed.* A statute conferred upon towns and cities power "to license, regulate or prohibit, the sale or giving away of intoxicating liquors." Held not to exclude the adoption of an ordinance prohibiting the drinking of all such liquors in public places.
4. MAXIMS—*Expressio—Unius, Exclusio, Alterius,* is in no sense an unalterable rule.
5. CONSTITUTIONAL LAW—*Municipal Powers.* Nothing in Article XXII nor the prohibitory act of 1911 withdraws from towns and cities the powers granted by Rev. Stat. sec. 6669.

THE question to be determined is the validity of a part of an ordinance of the City of Delta. The portion involved reads:

Error to Delta County Court, Hon. W. M. Dingman, Judge.

Mr. H. J. BAIRD, for plaintiff in error.

Mr. R. M. LOGAN and Mr. MILLARD FAIRLAMB, for defendants in Error.

Chief Justice Hill delivered the opinion of the court:

"No person shall drink any malt, vinous, spirituous or other intoxicating liquors, while in any business house, store building, restaurant, hotel, livery stable, billiard hall, pool room, bowling alley, or within any street or alley, within the City of Delta, * * * unless the person occupying the building, shall be duly licensed by the City of Delta to sell intoxicating liquors."

The complaints filed in the police court charged the defendants in error with drinking such liquors in a business house, store building, billiard hall, and pool room, in said city. Upon appeal to the County Court, the cases were consolidated for trial. The defendants objected to the introduction of the ordinance in evidence for the alleged reason that it is contrary to the provisions of the Constitution of the United States, that it is in violation of sections 3 and 4 of Article II of our Constitution; that it is in conflict with and contradictory to Article XXII of our Constitution concerning the sale, traffic or giving away of intoxicating liquors and that it is unreasonable, discriminatory and oppressive, and for these reasons not within the police power, hence void. The objection was sustained and the actions dismissed.

The city brings the case here for review and relies upon general section 6669, Rev. Stats., 1908, as its authority to pass the ordinance. It reads:

"Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this act, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of

such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding three hundred dollars, or by imprisonment not exceeding ninety days."

It is earnestly urged that the ordinance is unreasonable, oppressive and discriminatory, also that it is not drafted so as to effect any object within the proper scope of legislation. To sustain these contentions, counsel point out that it makes no difference under the ordinance, whether the act was done in public or private; whether the building within which drinking took place was closed to the public or open; whether done by day or at night; whether for medicinal or sacramental purposes, or as a beverage; that the character of the use is immaterial; that the presence or absence of other persons is immaterial; that the manner of use is immaterial; that there is no reason for discriminating against a person who has a right to take a drink of intoxicating liquors, by prohibiting him from exercising such right within a store building, yet allowing him to step outside the door, and take it on the vacant part of the lot; that while he may take a drink by stepping one foot off the street onto a vacant lot, he is prohibited from taking it while on the sidewalk, or in the business street; that these absurdities disclosed by this ordinance prohibiting a man from drinking at certain places, and not prohibiting it in others, could be multiplied almost *ad infinitum.*

The general rule is that the unreasonableness of an ordinance must be determined from the ordinance itself. The burden is on the defendants to establish that upon its face the ordinance is unreasonable.

In Vol. 2 Dillon on Municipal Corporations (5th ed.), section 591, the author says:

"But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised. When the ordinance is within the grant of power conferred upon the municipality, the presumption

is that it is reasonable, unless its unreasonable character appears upon its face."

In *Schmidinger v. Chicago,* 226 U. S. 578, it is said:

"This court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the courts are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with the laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred."

In discussing the unreasonableness of this ordinance, counsel assume that it was enacted in favor, as they say, "of the so-called temperance movement." The ordinance does not so indicate, but to the contrary discloses that it was enacted at a time when the sale of liquor was regulated by license, and was only intended to prohibit its being drunk in certain places with a view, evidently, of having no unnecessary notoriety attached to its consumption; also, to prevent children and young people and even others from witnessing such scenes in such public places, and thereby improve the morals, order, comfort and convenience of the inhabitants of the city. This, the statute says, they may do. Whether this ordinance has accomplished all that was expected, we, of course, do not know, but are of opinion that it was an effort along the lines authorized by section 6669, *supra,* if not sufficient in this respect and there is public drinking upon vacant lots adjacent to public buildings, as indicated, which it does not prohibit, it might be amended in this respect, to enlarge its scope, but we cannot agree that for these reasons it is unreasonable. Neither can we agree that it is discriminatory. It includes all streets, all alleys, all business houses, store buildings, restaurants, hotels, livery stables, billiard halls, pool rooms and bowling alleys where the person occupying the building has no license to sell. In other words, when considered in connection with our present state laws, it includes all places where people are prone to drink before

others when congregated together. It was this example of such drinking which the ordinance seeks to prohibit. There is no discrimination in the class of places selected, or the persons prohibited; whether it should have included other places or omitted some included, is a legislative, rather than a judicial question. That such provisions are reasonable, likewise not in violation of any constitutional provisions, either state or federal, in so far as any discrimination is concerned, must be conceded.

Walker v. The People, 5 Colo. 37, 37 Pac. 29; *Adams v. Cronin,* 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; *Cronin v. Adams,* 192 U. S. 108; *Commonwealth v. Price,* 123 Ky. 163.

The claim that because subdivision 18 of section 6525 Rev. Stats., 1908 (in force when this ordinance was enacted) gave to towns and cities the right to license, regulate or prohibit the sale or giving away of intoxicating liquors, prevented them from passing this portion of this ordinance under the rule that "the expression of one power is the exclusion of others concerning the same general subject" is not well taken. It might be sound if this section was the only authority for the city's actions. This section says "license, regulate or prohibit the sale or giving away of any intoxicating * * * liquor." It does not attempt to cover the question of where they shall be drunk, for this reason does not include the question covered by this ordinance, under another well known rule, viz., that the enumeration in the statute of the powers which may be exercised by a municipal corporation excludes such powers as are not enumerated.

People v. City of Chicago, 261 Ill. 16; *People v. Village of Oak Park,* 268 Ill. 256; *Town of Cortland v. Larson,* 273 Ill. 602.

It is not claimed that this portion of the ordinance was authorized by virtue of section 6525, *supra,* but by authority granted under section 6669, *supra.* Besides, the rule that "the expression of the one is the exclusion of the other" which counsel seek to apply to section 6525, *supra,*

is in no sense a fixed and unalterable one. If the question of its applicability to this contention is debatable, a complete answer to counsels' argument will be found in *Schwartz v. The People,* 46 Colo. 239, where a similar contention was made for a clause in the constitution which referred to the importation for and sale of poisonous or drugged liquors, etc., and where the authority to enact legislation prohibiting the sale of pure liquors was sustained, under the general legislative power clause in the Constitution.

In view of numerous recent decisions, both state and federal, concerning the liquor traffic, it is unnecessary to consider in detail the validity of this part of this ordinance from a constitutional standpoint concerning personal liberty, religious freedom, etc., or otherwise than what effect article XXII of the Constitution adopted at the 1914 election may have had upon it. This article, generally speaking, prohibits the manufacture for sale or gift; the importation into the state for sale or gift; the sale, or to be kept for sale, of any intoxicating liquors or the offering of same for sale, barter or trade. It provides that the handling and sale of such liquors for medicinal or sacramental purposes may be provided by statute, but it does not purport to prohibit the drinking of liquors within the state. After its adoption, the Twentieth General Assembly passed our present prohibitory act, pages 275-288, Laws 1915. This act prohibits the manufacture for sale or gift, or importation into the state for sale or gift, or the sale or keeping for sale, or offering for sale, barter or trade, of any such liquors, but like the constitutional amendment, does not attempt to prohibit the drinking of such liquors, and permits of their sale, for medicinal and sacramental purposes, under regulations as provided in the act. It exempts private residences occupied as such from its search and seizure provisions. It gives to cities and towns the right to co-operate regarding the matters therein referred to. Section 27 reads as follows: "Municipality may enact.—Any municipality may enact ordinances in

conformity with the provisions of this act." Just what kind of legislation is authorized by this section need not be determined. It indicates, however, a legislative construction of article XXII of the Constitution, as well as of the act itself, to the effect that neither was intended to prohibit towns and cities from enacting ordinances concerning intoxicating liquors. We are likewise of opinion that there is nothing in article XXII of the Constitution, or the 1915 prohibitory act, which conveys any intention of withdrawing from towns and cities the power granted them under section 6669, *supra*, to enact and enforce such an ordinance as that portion of the one under consideration, when, as here, it is not in conflict with the state law. The court committed error in refusing to admit the ordinance in evidence.

The judgment will be reversed and the cause remanded for a new trial not inconsistent with the views herein expressed.

Reversed and remanded.

Decision *en banc.*

No. 8859.

FORT MORGAN RESERVOIR & IRRIGATION COMPANY ET AL. *v.* STERLING IRRIGATION COMPANY ET AL.

1. CONTRACTS—*Ratification.* Several irrigation companies associated together for the protection of their rights, appointed a board of directors, and a president, authorizing the latter to have entire charge of the affairs of the association, under the supervision of the directors. The president employed attorneys who conducted litigations over several years, greatly to the advantage of the members of the association. There was no vote of the directors approving the selection of the attorneys but the president reported their employment, at a formal meeting of the board, and no objection was made then or afterward, during the pendency of the litigation. *Held* a ratification binding each member of the association.

The result is the same though the association be treated as having no legal existence.

2. CORPORATIONS—*Partnership of.* Several private corporations having similar interests formed an association for the protection

of the rights common to all. By the authority of those to whom they committed the management of their common affairs, attorneys were employed and a litigation carried on for several years, with the knowledge, and to the profit of all. All are liable to the attorneys' bill, even though the association be regarded as without legal existence.

Error to Morgan District Court, Hon. H. P. Burke, Judge. En banc.

Messrs. JOHNSON & ROBISON and STEPHENSON & STEPHENSON, for plaintiffs in error.

Mr. C. M. ROLFSON, Mr. T. E. MUNSON, for defendants in error.

Opinion by Mr. Justice Teller.

THE parties to this action were defendants below in an action to recover attorney's fees and disbursements in a course of litigation alleged to have been brought for and at the instance of said defendants. The plaintiffs in error admitted the allegations of the complaint and alleged that the other defendants were jointly and severally liable.

The defendants in error, by their answer, denied that the plaintiffs had been employed by them in said litigation.

On the trial, at the close of plaintiff's case, the court sustained a motion by the Julesburg Irrigation District for a non-suit as against it, directed a verdict in favor of the other defendants who now appear as defendants in error, and entered judgment against the defendants which had admitted liability. They bring the case here for review, and allege error in the court's rulings in favor of the other defendants.

The litigation for which the attorneys' fees are claimed grew out of the following circumstances.

The defendants in that suit were members of an organization known as "The Lower Platte Protective Association," an unincorporated body, formed by various ditch companies in Water Districts No. 1 and No. 64, and the Julesburg Irrigation District, for the announced purpose of protecting the irrigation rights of its members.

The plaintiffs acted as attorneys for the association in an adjudication of water rights, and in various suits in which the rights of these parties as appropriators were involved through claims by others for seepage, waste and flood waters by which said rights are in great part satisfied. All of the litigation resulted in favor of the members of said association.

The constitution of the association provided for a board of directors consisting of three members from each of the two districts, four of whom should constitute a quorum for the transaction of business. It further provided that the president was to "have general executive control over all the officers, agents and employes of the association," and that he should "have entire charge of the operation and conduct of the business and affairs of the association, under the direction and supervision of the board of directors."

The trial court held that, as against the defendants in error, the plaintiffs had failed to show an employment; this for the reason that they failed to show any formal action by the board in the matter.

That was the ground of defense below, as it is here.

The president of the association testified—and it is undisputed—that there was, from the inception of the movement to organize the association, a general understanding among the parties in interest that the plaintiffs were to be employed as attorneys of the association; and that in pursuance of such understanding, and after consulting a majority of the board, he employed the plaintiffs.

It appeared also from the testimony of the president and of two other directors that at least five of the directors had knowledge of plaintiffs' employment and of the work they were doing for the association. The president testified that he reported to the board, at a formal meeting, the fact that plaintiffs had been so employed, and that no objection was made thereto. It appeared, also, that the board allowed and paid a number of bills for services and expenses of other parties, rendered at the instance of the president

without formal authority from the board. Though the litigation extended over several years, there was no meeting of the board between 1908, the year in which the organization was formed, and the date on which the suit was begun.

There is no question as to the value of the services rendered by plaintiffs, nor is it denied that material benefits accrued to all these parties, as a result of plaintiffs' efforts.

The members of this association made some of its members their agents, under the designation of directors, to carry out the purpose for which the association was formed, and any valid contracts made by these agents will bind the principals.

It may be conceded that the so-called directors did not formally employ plaintiffs; yet, since Chase, one of the directors and acting as president of the association, reported to the board of directors the fact of such employment, and they made no objection thereto, the ratification of the act of employment is complete. *Henry v. Water Co.*, 10 Colo. App. 14, 51 Pac. 90, 10 Cyc. 1075, *et seq.*

Those members who had knowledge of the hiring and did not disaffirm it within a reasonable time are deemed to have assented to it. *Higgins v. Armstrong*, 9 Colo. 48; 10 Pac. 232, 10 Cyc. 1077. Where the act is beneficial to the principal, slight evidence of ratification will raise a presumption of ratification. *Ibidem* 1080; 2 Morawetz on Corporations, § 629.

Here the employment of an attorney to protect the interests of the members was the chief purpose of the organization. The employment of counsel was necessary to the furtherance of that purpose.

It is unnecessary to determine whether or not all the defendants in error were members of the association under its constitution, or whether an irrigation district may become a partner with other corporations or individuals.

The organization may be treated as having no legal existence, but the defendants in error, acting within their undoubted powers, unitedly chose six agents to carry out

a business enterprise for the benefit of all. The plaintiffs were retained by these agents, litigation was carried on for a period of years—of which all these parties must have had knowledge,—with results of great value to all. The defendants in error are enjoying the benefits of the transaction, and so far as the record shows, they made no objection to plaintiffs' employment until called upon to aid in paying therefor. The court erred in taking the case from the jury, and holding that the fact of employment was not proved.

The judgment is reversed.

Chief Justice Hill not participating.

No. 8897.

MCDONNELL v. SOLOMON.

ROOMING HOUSE—*Lien of Keeper.* Section 4013 of the Revised Statutes applies to hotels, boarding houses, rooming houses, and the like.

The evidence examined and held to warrant a judgment establishing the lien of a keeper of a rooming house upon the goods of the tenant.

Under Rev. Stat. sec. 3021 the goods of the wife are chargeable with the lien equally with those of the husband.

Error to La Plata County Court, Hon. Richard McCloud, Judge.

Messrs. PERKINS & MAIN, and Mr. L. M. PERKINS, for plaintiff in error.

Mr. JAMES A. PULLIAM, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

THIS action in replevin was instituted in a justice's court The plaintiff in error (hereafter called the plaintiff), sought possession of two trunks containing wearing apparel, one hat box with hat, two cases with surgical instruments and medicines, and one box of books, which were held by the defendant for the payment of room rent, for which she claimed a lien thereon by authority of section 4013, Rev.

Stats., 1908. Upon appeal to the County Court where the trial was to the court, the findings and judgment sustained the lien.

It is claimed that the evidence is insufficient to sustain the judgment. *Scanlon v. LaCoste*, 59 Colo. 499. 149 Pac. 835, L. R. A. 1915 F, 664 Ann. Cas., 1917 A, 254, is relied on as sustaining this contention. The ruling there is to the effect that where the owner of an apartment house rents an apartment, though furnished, for housekeeping purposes, and which is occupied as a home, that he is not entitled to a lien under section 4013, *supra*. The facts here do not fit that case, but present a condition which places it upon the border line. The record discloses that the defendant was not the possessor of an apartment house, as that term is generally understood, but to the contrary was in possession of the second story of a business building, with business places below, and seven rooms and a bath above; that these rooms were furnished by defendant; that she had a sign "furnished rooms" displayed; that she had posted in each of the rooms occupied by the plaintiff and her family, the statutory notice required to take advantage of the hotel and boarding housekeepers' act, etc.; that prior to her occupancy it had been run by others as a rooming house, once known as The Trumble Rooming House, once as The Goodman Rooming House, and that defendant's predecessors, as well as defendant, had for a long time run the place as a rooming house, viz, rented furnished rooms by day, week or month; that the plaintiff's husband rented, and with her and their two children, occupied, what was called two front rooms which faced out on the street, and one side room, so-called; that one of these rooms was furnished with a folding bed, dresser and wash-stand, another with a couch, dresser, stove, stand-table, and wardrobe, and the other with a folding bed, wash-stand, small table, stove and cupboard; all had carpets, window curtains, blinds, etc., furnished by defendant. The plaintiff furnished no furniture, the defendant furnished the coal and kindling for the stoves, also the lights and tele-

phone service; that all used the common bath, etc., which was outside of these rooms; that the entrance to the bath room was from the main hall; that the defendant took care of the bath room; that the defendant gave to plaintiff and her husband keys to these rooms; that the plaintiff took care of them, for which they were given a reduction in rent, below the regular rate; that the defendant had a pass key to them, with which (she said), to go in them whenever she wished; that the defendant washed the curtains, and windows during the period they were occupied by plaintiff and family; that the defendant had the only key to what is termed the outside door, being the hall door, at the bottom of the stairs. The plaintiff testified that while there, she cooked, and they ate their meals in the rooms. The defendant testified that the plaintiff's husband, the doctor, took his meals at a restaurant. They were there from about December the 1st to March 29th, at an agreed rate of $30.00 per month, after March 29th they gave up one room, but continued the use of the other two until April 20th at $20.00 per month. When they applied for the rooms, the rate given them was a monthly rate. The plaintiff with their two children left without notice, some time before her husband; he, likewise, left without notice on April 20th, leaving the goods in controversy in the rooms. The defendant testified that she phoned him, asking if he intended to give up the rooms; that he said he would have to, he did not have the money, and that he said for her to hold the baggage for the rent. It is urged that this statement would not be binding as against the wife. We agree with this, but as the husband made the arrangements for the rooms for himself and family, it is a circumstance tending to show the relation existing between the parties at the time. It is agreed that there is $107.00 still due for rent. The plaintiff claims that the property involved is hers, and that her husband has no interest therein. So far as the lien is concerned this makes no difference. Section 3021, Rev. Stats. 1908, makes her property equally chargeable with that of the husband for the expenses of the

family. Section 4013, *supra,* says, "Any person who rents furnished or unfurnished rooms, shall have a lien upon the baggage and furniture of his or her patrons, boarders, guests or tenants, for such boarding, lodging or rent." It is conceded that this section does not apply to rooms in office buildings, rented for office purposes, or to apartment houses where apartments are rented for homes. It must likewise be conceded that it was intended to apply to the class of rooms included in hotels, taverns, boarding houses, rooming houses, etc. The dividing line is sometimes hard to ascertain. In *Mathews v. Livingston,* 86 Conn. 263, 85 Atl. 529, it is said:

"The relation * * * depends upon the contract of hiring, gathered from its terms and interpreted in the light of the surrounding circumstances, having in end the finding of the intention of the parties to the contract. * * * It is a mixed question of law and fact."

This conclusion appears to be supported by the weight of authority and when the facts above outlined are considered, we cannot subscribe to the contention that there is no competent testimony upon which the finding can be sustained, for which reason the judgment will be affirmed.

Affirmed.

Decision *en banc.*

No. 8938.

DENVER & SALT LAKE RAILROAD COMPANY *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

1. UTILITIES COMMISSION—*Review of Orders.* Under sec. 52 of c. 127 of the laws of 1913 the review in this Court of the orders of the Public Utilities Commission is controlled by the considerations applying in other cases, except as otherwise provided by the act.

This court must determine whether the order of the Commission in question is just and reasonable, and supported by competent evidence heard by that body. This duty the court cannot escape.

The court is not, however, to overrule the order of the Commission where there is a substantial conflict in the testimony. The deductions of witnesses from the testimony, are not, in themselves testimony, and conflicts in such deductions are not considered.

2. ——*Power of the Court.* The court is without authority to prescribe in detail the rate, or division of the rate, to be charged by the several companies participating in the service. Sec. 52 of the statute simply authorizes it to affirm, vacate, or modify the order of the commission.

3. EVIDENCE—*Judicial Notice,* will not be taken of the records of the Utilities Commission.

4. UTILITIES COMMISSION—*Considerations Controlling Its Decisions.* The Commission is without authority in fixing railway rates, to take into account rates of which no evidence was offered.

Though the law imposes upon the Commission the duty to keep itself advised of the condition of the railway service, they are not to take this knowledge into account in deciding controversies as to divisions of the through rate, between the carriers participating in the service.

Where the Commission reduces the rates for the carriage of a commodity over different lines, inequalities in former divisions are not to be perpetuated.

That one of the several roads participating in the carriage, has, acting under compulsion, accepted an unreasonable share of the previous through rate does not warrant the continuation of this unreasonable division.

The strategic position of a railway may in the matter of the division of a through rate, be considered, but it is not the controlling factor.

A railway which carries a coal for which there is an increasing demand, should not be discriminated against because this article is produced upon its lines. It is of public interest that such coal should move freely to the regions where it is demanded.

Where several companies participate in the carriage of a commodity produced upon one of them, the whole line of which is within the state, the number of cars furnished by the other companies is not to be considered in fixing the division of the through rate, where there is no testimony as to the number of cars furnished for the traffic within the state, or the number furnished for the carriage to points beyond the state.

A reasonable division of a joint rate is not to be denied to one of those engaged in the service because of derelictions, past, present, or anticipated.

A company having no terminal facilities at the point where it delivers freight to other companies participating in the through

carriage must pay the customary reasonable charge made for switching by other companies.

If an excessive charge is made for this service the company aggrieved is not to retire from the service, but to apply to the Commission for relief.

Error to the Public Utilities Commission.

Mr. TYSON S. DINES, Mr. TYSON DINES, JR., Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGEL, for petitioner.

Mr. E. E. WHITTED, Mr. T. M. STUART, JR., Mr. WILLIAM V. HODGES, Mr. WALLACE T. HUGHES, Mr. D. EDGAR WILSON, Mr. HAROLD H. HEALY, Mr. C. C. DORSEY, Mr. JOHN Q. DIER, for respondents.

Chief Justice Hill delivered the opinion of the court.

THIS action is to review an order of our Public Utilities Commission fixing a division or apportionment of through rates on coal to be shipped from points in northwestern Colorado, known as the Oak Hills district, on the road of the petitioner to points in the eastern part of the state on the roads of the respondents. (2 Colo. P. U. C. Rep. 8.) For convenience, the petitioner, The Denver & Salt Lake Railroad Company will be called "the Moffat road"; the respondent, The Chicago, Burlington & Quincy Railroad Company "the Burlington"; The Union Pacific Railroad Company, "the Union Pacific;" the Chicago, Rock Island and Pacific Railway Company and its Receiver, "the Rock Island;" and our Public Utilities Commission, "the Commission."

The record discloses, that on January the 11th, 1915, the Commission instituted, on its own motion, an investigation into the rates charged on coal between these and other points in the state; that, on May 10th following, it announced its opinion, and entered its order. (1 Colo. P. U. C. Rep. 48.) By this order, it required the carriers, who are parties to this action, to establish new rates for the transportation of coal between the points above referred to, which new rates as a whole were materially lower than the former ones, varying from no change at a few

points, to as high as thirty per cent. reduction, to others, probably an average reduction of at least ten per cent., the exact amount being immaterial so far as this controversy is concerned. The carriers being unable to agree upon a division of the new rates, the Moffat road appealed to the Commission to decide it. Its decision was that as between the Moffat, the Burlington and the Union Pacific the new rates should be divided in the same proportion as the former, each bearing its proportion of the reduction in proportion to what its proportion of the old rate bore to the whole; that as between the Moffat and the Rock Island, the divisions should be similar to those on the other roads, which were different than the former divisions between them. The Moffat road brings the case here for review and contends, that the divisions for it are unjust, unreasonable and contrary to the evidence, and that there is no testimony to sustain the justness of the order.

The respondents contend, that this court is without jurisdiction to interfere in the respect complained of; that the fixing of the divisions is along the same line as the establishment of reasonable rates, and is legislative in character; that this prohibits a review of that question by this court; that it is the exercise of an authority which the law vests in the Commission, viz., the determination of a question of fact, and that any attempt to provide for a review by a court and for its final determination of the matter would be unconstitutional, as giving to the judiciary non-judicial powers; that the courts must not usurp administrative orders on their own conception of their wisdom; that, in any event, the questions of divisions are questions of fact, which were determined upon conflicting evidence, hence, cannot be disturbed.

The principles upon which courts act in such cases and their jurisdiction are well settled. All such acts, so far as we are advised, including those involving the Interstate Commerce Commission, provide for review by the courts. No case has been cited which holds that similar provisions providing for review are for that reason invalid. The de-

batable question is the scope and extent of the review, and the court's judgment in connection with it. Section 52 (p. 497-498, Laws, 1913) of our act provides for a review by this court, for the purpose of having the lawfulness of the Commission's order inquired into and determined. It provides that no new additional evidence may be introduced in the Supreme Court, but the case shall be heard on the record of the Commission as certified by it. It further provides that the review shall not extend further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order of decision under review violates any right of the petitioner under the Constitution of the United States, or of the state of Colorado, and whether the order of the Commission is just and reasonable, and whether its conclusions are in accordance with the evidence. It also provides that the findings and conclusions of the Commission on disputed questions of fact shall be final, and shall not be subject to review; also that upon hearing the Supreme Court shall enter judgment either affirming, setting aside, or modifying the order or decision of the Commission. Section 53 provides that pending a review, this court may stay or suspend, in whole or in part, the operation of the Commission's order on certain conditions, etc.

It will thus be observed, that, among other things, the act requires this court to determine whether the order of the Commission is just and reasonable, and whether its conclusions are in accordance with the evidence.

This language assumes, as other parts of the act provide that the Commission will take testimony, and base its decision thereon, and that on review, the testimony will be made a part of the record for consideration by this court. Section 52 further provides that the provisions of our code of civil procedure, relative to rights of review, shall, so far as applicable, and not in conflict with the provisions of this act, apply to proceedings had in this court under the provisions of this section. When these sundry provisions are considered together, it follows that our reviews

of such cases was intended to be the same as in other cases between litigants except as otherwise provided or limited in the act.

Counsel for respondents contend that the question of a reasonable division of rates is a question of fact, and that as section 52 of the act prohibits us from reviewing any question of fact based upon conflicting testimony, we are without jurisdiction to go into that question. In order to properly construe this paragraph, it should be considered in connection with those immediately preceding it. They provide that we shall determine whether the order of the Commission is just and reasonable, and whether its conclusions are in accordance with the evidence. When they are read together, we agree that our duties in so far as this phase of the contention is concerned, are controlled and limited by them. We cannot agree, however, that they prohibit us from considering the evidence in order to ascertain from it, which the act says we shall do, whether the order is just and reasonable, and whether the Commission's conclusions are in accordance with the evidence. This includes whether there is a substantial conflict in the evidence which, if there is, we agree would prohibit us from overruling the Commission's findings based thereon. Our conclusions in this respect are supported by the highest court in the land.

In *Interstate Commerce Commission v. Louisville Nashville Railroad Company*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. 185, the court had under consideration an order of the Interstate Commerce Commission reducing rates. In discussing its powers to review such orders, the court, at page 91, said:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' * * * or, if the facts found do not, as a matter of law, support the order made.

* * * In a case like the present the courts will not review the Commission's conclusions of fact * * * by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' "

To the same effect is *Interstate Commerce Commission v. U. P. R. R. Co. et al.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108. In *Louisville & N. R. Co. et al. v. United States et al.*, 216 Fed. 672, in commenting upon the same question, at page 679, the court said:

"Accordingly it is well settled that where all the evidence introduced before the Commission is exhibited to the court, its conclusion of fact that a given rate is reasonable or unreasonable, will be accepted by the court as final and not reviewed upon the weight of the evidence, unless either there is no substantial evidence supporting such conclusion or such conclusion is contrary to the indisputable character of the evidence; in which cases the conclusion involves an error of law and is therefore reviewable by the court."

In *Louisville & N. R. Co. v. United States*, 227 Fed. 258, at page 262, the court says:

"It is well settled, on the one hand, that a conclusion of the Commission upon a question of fact, such as the reasonableness of a rate or the giving of a preference, whose correctness depends wholly upon a consideration of the weight to be given evidence before it, will not be reviewed by the court; and, on the other hand, that a conclusion which plainly involves under the undisputed facts, an error of law, or which is shown to be supported by no substantial evidence or to be contrary to the indisputable character of the evidence, thereby likewise involving an error of law, will be so reviewed."

In *State v. Great Northern Ry. Co.*, 130 Min. 57, 61, 153 N. W. 247, Ann Cas., 1917 B, 1201, in passing upon this

phase of their statute, the Supreme Court of Minnesota, at page 248, says:

"The order may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws or if it is beyond the power granted to the Commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

In *Louisiana & P. Ry. Co. et al. v. United States et al.*, 209 Fed. 244, in referring to a finding of the Interstate Commerce Commission, the court, at page 250, says:

"Whether or not this is a justifiable finding of fact is to be determined, in the first instance, by the Interstate Commerce Commission. When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in being based upon improper distinctions and considerations."

This opinion was approved by the Supreme Court of the United States in *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741. While these cases apply to orders fixing rates, the same rule follows in division cases; the federal courts have thus applied them in reviewing such cases. *Louisiana & P. Ry. Co. et al. v. United States, supra; O'Keefe v. The United States*, 240 U. S. 294, 60 L. Ed. 651, 36 Sup. Ct. 313.

The rule pertaining to reviews in the cases quoted from are applicable here, and call for a consideration of the evidence in order to determine whether there is competent testimony to support the findings of the Commission and whether the Commission's order is just and reasonable. This, the statute says we shall do; hence is a duty which we cannot escape.

C., R. I. & P. R. Co. v. Nebraska State Railroad Com-

mission et al., 85 Nebr. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444, relied on by respondents, does not sustain their position. So far as applicable, it is in harmony with the views herein expressed. The Nebraska statute provides for appeals from the Commission to the District Court with a proviso:

"In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the * * * orders * * * complained of are unreasonable and unjust to it."

It further provides that the Commission's order "Shall, when properly authenticated * * * be received in evidence in the trial of said cause, that said * * * order * * * is *prima facie* just and reasonable."

Upon review, the Supreme Court said:

"Under all the facts in evidence, and giving the statutory presumption proper weight, we are satisfied that the order of the commission is not unreasonable, and the judgment of the district court so finding is affirmed."

This holding is to the effect that the testimony was sufficient to support the finding of the District Court.

The Moffat road claims that the conclusions of fact which the Commission arrived at, as set forth in its opinion, do not, as a matter of law, support the order made; that the Commission's order is not only not supported by the evidence, but is contrary to its legal effect. We have given the testimony careful consideration, and find no real conflict in it. It is not claimed that there is, upon any question of fact, such as locations of mines, quality of coal, prior business markets, roads, distances, tonnage, amounts carried, equipments of the different roads, proportion of cars furnished for the coal business, cost of carriage, rates heretofore charged by these and other roads, divisions thereof, agreements pertaining thereto, distances in connection therewith, local rates east and west, hauls on all lines, difference in cost of hauls, empties hauled and furnished and all other such facts. The conflict, if any, is in the conclusions drawn therefrom by the witnesses, which, in-

stead of being testimony, is simply their deductions as to the legal effect of the evidence concerning the real facts, which are not in dispute. These deductions were for the Commission to make, and are questions of law rather than of fact. We admit that there is a conflict in the deductions of these different witnesses. For example, one testified that Interstate Commerce Commissioner Clark had characterized divisions as a matter of barter and trade; for this reason, certain deductions follow that because certain rates at certain places had once been approved by the Interstate Commerce Commission, that certain conclusions should follow here. Another testified that because certain originating carriers had accepted lower proportions in order to assist them to find markets not on their lines, that certain conclusions should follow in this case. Such matters were but reasons or arguments as to what they thought ought to follow. When it came to testimony of existing facts pertaining to rates, divisions upon other roads, the custom concerning such matters, etc., there was no dispute.

In *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108, it is said:

"Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts."

This declaration is likewise applicable to the question of a division of rates. It is undisputed that between Oak Hills and Denver the Moffat road crosses the continental divide at an altitude of 11,660 feet, with twenty-eight miles of four per cent grade, sixteen ascending from the west,

and twelve descending; that the topography of the country through which it runs is almost entirely mountainous, with sharp curves, excessive grades and high altitude; that, for these reasons (and the Commission so found) its operating conditions are more difficult and expensive than on the lines of the respondents, to the towns upon the prairie country east of Denver. It was also shown, that the westbound movement into Colorado on respondents' lines was much heavier than the eastbound movement, outside the coal traffic, and that the coal movement east over them furnished loads to many cars which, at times, would otherwise have to go back empty; that the principal traffic on the Moffat road is coal for Denver, and the east; that this necessitates the hauling of a large number of cars west from Denver to Oak Creek empty, which adds materially to its cost in the transportation of coal the other way. It is also agreed, that the average distance from Oak Hills coal district on the Moffat road to Utah Junction, is two hundred twelve miles; that from this point the Moffat road, out of its divisions, absorbs a switching charge for delivery to the Union Pacific, and the Rock Island of twenty cents a ton, yet regardless of all of these facts the Commission awarded to the respondents' roads a much greater portion of the through rate per mile, than it allowed to the Moffat road, being an average of nearly twice as much. To illustrate, the divisions on lump coal (the others being similar in proportion), to which we will add the equivalent per ton per mile in cents allowed each road, to ten out of some sixty-five stations on the Burlington (the divisions to the remainder being fixed on the same basis), are as follows. Derby, distance from Utah Junction ten miles, through rate $1.90 per ton, Moffat's portion $1.50 per ton, equivalent to .71 cents per ton per mile, Burlington's portion 40 cents per ton, equivalent to 4 cents per ton per mile; Barr twenty-two miles, through rate $2.00 per ton, Moffat's portion $1.303 per ton, equivalent to .61 cents per ton per mile, Burlington's portion 69.7 cents per ton, equivalent to 3.17 cents per ton per mile; Hudson, thirty-four miles, through

rate $2.10 per ton, Moffat's portion $1.26 per ton, equivalent to .59 cents per ton per mile, Burlington's portion 84 cents per ton, equivalent to 2.47 cents per ton per mile; Wiggins, sixty-eight miles, through rate $2.40 per ton, Moffats' portion $1.241 per ton, equivalent to .59 cents per ton per mile, Burlington's portion $1.159 per ton, equivalent to 1.70 cents per ton per mile; Akron, one hundred sixteen miles, through rate $2.85 per ton, Moffat's portion $1.296 per ton, equivalent to .61 cents per ton per mile, Burlington's portion $1.554 per ton, equivalent to 1.34 cents per ton per mile; Schramm, one hundred forty-eight miles, through rate $3.15 per ton, Moffat's portion $1.39 per ton, equivalent to .68 cents per ton per mile, Burlington's portion $1.76 per ton, equivalent to 1.19 cents per ton per mile; Laird, one hundred seventy-six miles, through rate $3.40 per ton, Moffat's portion $1.499 per ton, equivalent to .71 cents per ton per mile, Burlington's portion $1.901 per ton, equivalent to 1.80 cents per ton per mile; Sterling, one hundred twenty-three miles, through rate $2.95 per ton, Moffat's portion $1.318 per ton, equivalent to .62 cents per ton per mile, Burlington's portion $1.632 per ton, equivalent to 1.33 cents per ton per mile; Amherst, one hundred eighty-seven miles, through rate $3.50 per ton, Moffat's portion $1.362 per ton, equivalent to .64 cents per ton per mile; Burlington's portion $2.138 per ton, equivalent to 1.14 cents per ton mile; Hereford, two hundred miles, through rate $3.50 per ton, Moffat's portion $1.32 per ton, equivalent to .62 cents per ton per mile, Burlington's portion $2.18 per ton, equivalent to 1.09 cents per ton per mile. To eight of thirty-eight stations on the Union Pacific (the divisions to the remainder being on the same basis) are as follows: Sandown, four miles from Pullman station in Denver, where the Union Pacific receives the coal, through rate $2.00 per ton, Moffat's portion $1.50 per ton, equivalent to .71 cents per ton per mile; Union Pacific's portion 50 cents per ton, equivalent to 12.50 cents per ton per mile; Sable, eight miles, through rate $2.00 per ton, Moffat's portion $1.364 per ton, equivalent to .64 cents

per ton per mile, Union Pacific's portion 63.6 cents per ton, equivalent to 8 cents per ton per mile; Bennett, thirty miles, through rate $2.15, Moffat's portion $1.152 per ton, equivalent to .54 cents per ton mile, Union Pacific's portion 99.8 cents per ton, equivalent to 3.32 cents per ton per mile; Hugo, one hundred three miles, through rate $2.75 per ton, Moffat's portion $1.25 per ton, equivalent to .59 cents per ton per mile, Union Pacific's portion $1.50 per ton, equivalent to 1.46 cents per ton per mile; Kit Carson, one hundred fifty-one miles, through rate $3.15 per ton, Moffat's portion $1.26 per ton, equivalent to .59 cents per ton per mile, Union Pacific's portion $1.89 per ton, equivalent to 1.25 cents per ton per mile; Chemung, one hundred ninety miles, through rate $3.50 per ton, Moffat's portion $1.40 per ton, equivalent to .66 cents per ton per mile, Union Pacific's portion $2.10 per ton, equivalent to 1.11 cents per ton per mile; Masters, seventy-one miles, through rate $2.45 per ton, Moffat's portion $1.267 per ton, equivalent to .60 cents per ton per mile, Union Pacific portion 1.183 per ton, equivalent to 1.67 cents per ton per mile; Julesburg, one hundred ninety-five miles, through rate $3.50 per ton, Moffat's portion $1.47 per ton, equivalent to .69 cents per ton per mile, Union Pacific's portion $2.03 per ton, equivalent to 1.04 cents per ton per mile. To ten stations on the Rock Island east of Limon, the divisions are about the same as on the Union Pacific east of the same point.

In its former opinion wherein it reduced these through rates, the Commission found that the reduced rates fixed by it were just and reasonable, and would give to the carriers a sufficient return for the services performed. In commenting concerning it, they said:

"The Commission has given careful consideration to the conditions surrounding each particular line, and feel that they have been most liberal with the carriers in arriving at the various rates in this case. In no case, except in very long hauls, has the rate been reduced to less than one cent

per ton per mile, the general average being from 12 to 14 mills per ton per mile."

Yet in this case, when it came to divisions, the Moffat road is not given any such amounts as were stated in the former case that the particular lines were entitled to. For instance, to shipments on the Burlington, the Moffat is given rates of 5.9 mills to 7.1 mills per ton per mile, instead of an average of 12 to 14 mills, as the former opinion states; whereas, the Burlington divisions on this haul yield it from 1.09 cents to four cents per ton per mile, or nearly twice as much upon its longest hauls, and up to about six times as much per ton per mile upon its shortest haul, an average of about twice as much on all hauls. The same is true concerning the Union Pacific, and the Rock Island. It will thus be observed that these divisions are all out of proportion to the mileage, the amount allowed per ton per mile for such mileage, or the cost of carriage. 'Tis true, as counsel for respondents urge, the testimony shows that for a short haul on their lines the expense of carriage is greater per mile than upon a longer haul on the same line. For this reason they urge they should be allowed a greater amount per mile than the Moffat road for its longer haul. We appreciate that the Interstate Commerce Commission recognizes this fact, and makes such allowances to the extent of fixing a minimum of twenty-five per cent for the short haul. See *Hayden Brothers Coal Corporation et al. v. Denver & Salt Lake Railroad Co. et al.*, 45 I. C. C. 236, wherein at page 244, it is said:

"The result of applying the method of dividing on a mileage prorate with a minimum of 25 per cent to the short line, which is a common method of dividing rates when an originating or delivering line has a relatively short haul."

If this rule were applied here, and the cost of carriage for the shorter haul considered as a factor in fixing the divisions, which we agree should be, it must still be conceded that there are but two hauls involved which do not give respondents a division greatly in excess of twenty-five per cent., while there is no testimony which shows that

any of these hauls on their lines cost any more, or even as much, per mile, as does the longer hauls on the Moffat line. Besides, this argument does not sustain the claim that the Commission's divisions were based upon the theory of these differences in the distances of carriage, for the reason that the same discrimination is made to stations where the distance on each road is about the same. To illustrate, the distance from Utah Junction to Hereford on the Burlington is two hundred miles, the through rate is $3.50 per ton, the Moffat's portion is $1.32, or .62 cents per ton per mile, the Burlington's portion is $2.18 per ton or 1.9 cents per ton per mile, being over twice as much for practically the same distance. The remainder of the longer hauls, from fifty miles up, on the Burlington will be found upon practically the same basis. This is likewise true of the Union Pacific. Take Julesburg one hundred ninety-five miles from Denver, or Pullman station in Denver, where it receives the coal, the through rate is $3.50 per ton, the Moffat's portion is $1.47 per ton, or .69 cents per ton per mile, the Union Pacific's portion is $2.03 per ton, or 1.04 cents per ton per mile; to Chemung, a distance of one hundred ninety miles from Pullman, the through rate is $3.50 per ton, the Moffat's portion is $1.40 per ton, or .66 cents per ton per mile, while the Union Pacific's portion is $2.10 per ton, or 1.11 cents per ton per mile. In arriving at this conclusion the Commission says:

"It is a general principle that the proportion of a through rate shall be somewhat lower than the local rate; there are many reasons why this should be so, and the Commission can see no reason why that principle should not be followed in this case."

The Commission, however, did not apply this principle to the respondents' roads, but only to the petitioners'. In comparing these rates with the rates on respondents' roads from the northern coal field immediately north of Denver, the Commission says that they are not disproportionate with them. But their figures are not in harmony with these findings. They show that in making these divisions

they gave to the Union Pacific, to points on its Kansas division east of Denver, and to points on its Julesburg branch east of La Salle divisions, which average about ninety and eight-tenths per cent. and one hundred two and two-tenths per cent., respectively, of its local rate from the northern Colorado coal fields to the same points; when it only gave to the Moffat road eighty and eighty-five per cent., respectively of its local rates to Denver; that they gave to the Burlington divisions, which average one hundred twenty per cent. of its local rate from the northern coal fields to the same points, while it gave to the Moffat road on coal going to these same points, divisions which average only eighty-four per cent. of its local rate to Denver. Besides, there is no testimony which shows that these local rates on the Burlington and the Union Pacific are exceptionally low, as was shown concerning the Moffat local rate to Denver. The petitioner claims that there was no testimony offered of these local rates on the Burlington and the Union Pacific, for which reason that the Commission was without authority to consider them for comparison purposes. The petitioner also claims that had they been introduced in evidence, it could have shown that these hauls were on prairie lines, etc., and therefore not comparable to that of the Moffat road. Respondents have failed to show, and we have been unable to find, that these local rates were offered in evidence, for which reason the Commission was without authority to consider them for any purpose. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. We have commented upon these rates, using the figures given in the Commission's opinion, and the briefs for the purpose of showing (were they in evidence) the unequal portion of the divisions here made, when compared with the local rates of each line. The respondents recognized these vast discriminations, in so far as all facts heretofore stated are concerned. They seek to justify their right to the excessive portion on the theory, among others, of strategic position, prior service to these districts from

other fields, which, under the former higher rates gave them these same divisions, and for the further reason that since the reductions other initial carriers have agreed with them upon the old divisions.

The record discloses that for many years the respondents have been receiving coal from other roads at Denver, and delivering it to these stations from what is called the Walsenburg district, an average of one hundred ninety-five miles south of Denver; that coal from this district, under the old divisions had been supplied to these stations for many years before coal from the Moffat Oak Hill district entered the field; that in 1909 the Oak Hill district first became a factor, when the Moffat road fixed a rate to Denver of $1.60 per ton on lump coal and $1.40 per ton on slack, being the same as from the Walsenburg district; that it likewise accepted the same divisions of the through rates to points involved (except stations on the Rock Island) as were given to the initial carriers from Walsenburg. For these reasons and others, which will hereafter be considered, respondents contend that when any deduction is made in the through rate, it should follow, as a matter of course, that the divisions of the lower rate should be upon the same basis, regardless of the inequalities in the former divisions. The Commission appears to have acquiesced in this position. We cannot agree with this conclusion, and the authorities do not sustain it. The Commission held that the former through rates were unreasonable and that the reduced through rates fixed by it were reasonable. It did not change the former rates from either district into Denver, for which reason its holding must have been that they were reasonable.

In *People's Fuel & Supply Co. v. Grand Trunk Western Railway Co. et al.*, 27 I. C. C. 24, at page 28, the Interstate Commerce Commission says:

"It is not the separate factors in a through rate, but the rate or charge as a whole, to which the test of reasonableness must be applied. In examining into the reasonableness of a combination rate or charge we are not, however,

precluded from looking to the several factors thereof, in an effort to locate unreasonableness in the total charge."

This comment is applicable to the facts here. The Commission held the former through rate unreasonable, but in making this division of the new lower rates, they based it practically upon two grounds, and decline to give consideration to the other general factors in an effort to locate the unreasonableness in the former total charge, in order to place the apportionment of the new rate where it properly belongs.

In *Stacey & Sons v. Oregon Short Line Railroad Co. et al.*, 20 I. C. C. 136, in speaking on the subject here involved, the Interstate Commerce Commission, at page 139, says:

"The question of divisions of these rates is of course now left to the defendants to agree upon. * * * A mileage prorate basis of division would divide the earnings according to the service actually performed by each carrier."

In commenting upon this language, our Commission, in its opinion said:

"We agree with the Interstate Commerce Commission in the above statement. It is, however, of no assistance to the Commission in this case."

If they considered, as they say, that it was of no assistance to them, that means that the mileage basis was not given any consideration, or considered as a factor, or as having any bearing, in the fixing of these divisions, the divisions fixed confirm this statement. This was an error of law. Such questions are always a proper element to be considered.

Pulp & Paper Mfg. T. Assn. v. C. M. & St. P. Ry. Co. et al., 27 I. C. C. 82; *Hayden Bros. Coal Corporation et al., v. D. & S. L. R. Co. et al.*, 45 I. C. C., 236.

The respondents assert that because of the prior existence and divisions of the old Walsenburg rates, and their acceptance by the Moffat road, that this is conclusive evidence that those divisions were reasonable and that for this reason the divisions of the lower rates should be upon the same basis. This position was evidently accepted by

the Commission. This does not follow as a matter of course, and is in conflict with the previous ruling of the Commission that the former through rates were unreasonable. These through rates were the sum of the divisions, they being condemned by the Commission as too high, it necessarily follows that the division to at least one of the carriers was also too high. The record shows that when the old Walsenburg rates and divisions were agreed upon, we had no Commission to appeal to in such cases. It was not until June, 1906, that the Interstate Commerce Commission had power to prescribe interstate rates.

Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.), 1151, Ann. Cas. 1916 A 18; *I. C. C. v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

The record shows that in order to get its coal into the Denver market, the Moffat road, when cost of carriage is considered, made a very reasonable local rate for that service; that it accepted the Walsenburg divisions of the old through rates on the Burlington and the Union Pacific, because they were the best that it could get at that time, and that it was willing to participate in those divisions, even though not profitable to it; in order to develop the coal industry along its line The right to do this is recognized by the Interstate Commerce Commission.

In *Indianapolis Freight Bureau v. P. R. R. R. Co.*, 15 I. C. C. 567, at page 576, the Interstate Commerce Commission says:

"A carrier may voluntarily make, under the force of controlling competition, rates which it might not be required to make."

Our Commission has recognized this fact. In *Greeley Gas & Fuel Co. v. The Colorado & Southern Ry. Co. et al.*, 1 Colo. P. U. C., 197, it held that voluntary rates established by carriers under high competitive conditions are not a fair measure of comparison with rates between points where little or no competition exists. By analogy, this position is applicable to a division of rates; a carrier may

voluntarily agree to a division which it might not be required to accept. This principle applies to this case. It should be borne in mind that it is the Commission's rates and the division of those rates by the Commission which are involved. They are not a matter of barter and trade and the Moffat line is not at liberty to withdraw from them if they are unprofitable, and it believes them to be unjust. For these reasons, we cannot agree that because they participated in former rates, and certain divisions thereof, which gave them a greater amount for the services rendered than those under consideration, that it follows as a matter of course that a similar division upon a lower rate fixed by the Commission is just, or that for this reason it should be divided upon the same basis and the authorities do not so hold.

In *Burnham, Hanna, Munger Co. v. C., R. I. & P. Ry. Co.*, 14 I. C. C. 299, the Interstate Commerce Commission held that the through rates from eastern points to the Missouri river cities were unreasonably high; that they were so because those portions of the through rate between Mississippi river crossings, and Missouri river cities were too high; for this reason it ordered that the divisions of certain carriers upon through transportation between Mississippi river crossings and the Missouri river cities should be reduced to a scale as therein defined. This order was upheld by the Supreme Court of the United States, *I. C. C. v. C., R. I. & P. Ry. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651. It was again observed by the Interstate Commerce Commission with a slight change by increases to the western lines. *Warnock Company et al. v. C. & N. W. Ry. Co. et al.*, 21 I. C. C. 546. The mileage of the western lines in those cases in proportion to the whole were, prior to this reduction, less out of proportion than the mileage to the stations east of Denver in connection with the total mileage under consideration. The fact that the former divisions had been originally agreed upon and worked under for years, was not considered as a controlling factor in taking the reduction all off of the western lines. In

State of Iowa v. St. P., M. & O. Ry. Co. et al., 28 I. C. C. 64, at page 73, the Interstate Commerce Commission said:

"It does not follow, however, that a carrier's separate rates applicable to through transportation are beyond control and regulation by the Commission. On the contrary, it not infrequently happens, as in this case, that the through charges for the through service are unreasonable because one of the proportionals entering into the through charges is excessive; and in such a case and upon a proper record our authority to reduce the unreasonable through charges by reducing the excessive proportional rate is beyond question. The reasonableness of the through rates is challenged, however, by some of the complainants, and that question is before us on the pleadings and on the record, and is the question that is more particularly dealt with in this report.

In support of the various contentions of the complainants a large volume of testimony was offered, together with numerous diagrams, plats, and other exhibits, financial and otherwise, by means of which the facts are graphically represented. Although the eastern defendants took no active part in the hearing, the defense by the western lines was prepared with care. All the points to which these exhibits and testimony were directed have had careful consideration, but it is not possible and would not be profitable to extend this statement of the case by a discussion of them in detail. It will suffice to say that upon the whole record we have arrived at the conclusion, and so find, that the rates on class traffic moving between interior Iowa points and the territory east of the Indiana-Illinois state line are excessive and unreasonable, and therefore unlawful. The proportional rates between the Mississippi River and the eastern territory last defined are in harmony with the general system of rates east of the river, and there is no basis of record for condemning that factor in the through charges. The through rates exacted of shippers are made excessive by reason of the demands of the carriers west of the river, and this is the factor in the through charges that

we here condemn in finding that the through charges are excessive."

In *Cedar Rapids Commercial Club v. C., R. I. & P. Ry. Co.*, 28 I. C. C. 76, the Commission had under consideration the question of rates between Chicago and interior Iowa points. It was held that the rates between such interior points and Chicago were unreasonable, and unduly discriminative in comparison with the rates of the river towns; for this reason the through rates were unreasonable, but that the reduction should be on a graded scale between the Mississippi river and those interior Iowa points.

In *Stacy & Sons v. O. S. L. R. A. Co.*, 20 I. C. C. 136, after holding that certain through rates were unreasonable, the Commission, at page 139, says:

"The question of divisions of these rates is of course now left to the defendants to agree upon. It may be that their divisions will depend somewhat upon whether the traffic is exchanged at Silver Bow or at Butte. The Oregon Short Line haul to the junction with the Northern Pacific would be the same on a shipment to Fargo as a shipment to Bismarck, while the Northern Pacific haul would be considerably greater to Fargo than to Bismarck. The Oregon Short Line haul will be somewhat longer on shipments from Hot Springs or Brigham than on shipments from Logan. An arbitrary basis of divisions would ignore these differences in the lengths of the hauls. A mileage prorate basis of divisions would divide the earnings according to the service actually performed by each carrier. If defendants are unable to agree upon the divisions of the rates herein prescribed the Commission will, upon further hearing, determine that question."

Neither can we agree that it is always customary where a through rate has been reduced, to prorate the reduction between the carriers upon the same basis as each one's reduction bore to the whole. In some cases that system has been adopted, but an investigation of them will disclose that the original apportionment was in harmony with some reasonable division in proportion to the mileage of each, and

the services rendered; while in others the rule has not been followed at all; but to the contrary they are based upon some equitable division in proportion to the mileage of each. For instance, in *Sloss-Sheffield Steel & Iron Co. et al. v. L. & N. R. R. Co. et al.*, 35 I. C. C., 461, where a reduction was made on pig-iron rates in car lots from producing points in Alabama and Tennessee to points north, including Chicago, it was held that the southern carriers should bear twenty-three cents, and the northern carriers twelve cents out of a thirty-five cent reduction from a former rate of $4.35 when reduced to $4.00. The new division gave to the southern lines operating between Birmingham and the Ohio river $2.52 and the northern lines operating between the river and Chicago, $1.48, the former division of the $4.35 rate being $2.75 to the southern line and $1.60 to the northern lines, the average distance through the gateway (the Ohio river) was three hundred sixty-six miles from Birmingham, and two hundred eighty-seven miles from Chicago.

While it may be conceded that the strategic position of a company's road may be taken into consideration in the matter of divisions, it is not by any means the sole or controlling factor. In the case last cited on this subject, the Commission, at page 463, said:

"The northern carriers take the position that no part of the reduction should be borne by them. Their contention is based chiefly on the theory that pig iron from the south displaces pig iron produced at furnaces in their own territory, and therefore does not furnish them any additional traffic over and above what they would otherwise haul. In view thereof, and of the fact of their strategic position, with respect to traffic that originates in their own territory, they claim to be possessed of equities and of trade advantages which entitle them to larger divisions than they might otherwise reasonably demand.

The contention in part implies an assumption that there is practically no demand for pig iron in the northern markets which could not be supplied from furnaces in central

freight association territory. The evidence shows, however, that for many uses, especially in the manufacture of stoves, small castings, and certain kinds of machinery, southern iron is preferred, and that there is considerable demand for it in the northern markets. It commands a ready sale as a mixture for many kinds of iron products. This is true to such an extent that some foundries are quite largely dependent upon it because of its peculiar qualities as distinguished from pig iron from the northern furnaces. It is therefore a matter of general public interest that southern iron should move freely into the northern territories."

To some extent this condition prevails here. The uncontradicted testimony discloses that the Moffat coal is harder than that in the southern fields, or even the Rock Springs Wyoming coal on the Union Pacific, or that in the Big Horn Basin on the Burlington, and, that it develops tests which disclose its superior qualities. The coal in the local fields north of Denver is not claimed to be its class; that for all of these reasons there is an increasing demand for it, and that it commands a ready sale, which is increasing in the territory in question, as well as in Nebraska, Kansas and other points. In such cases, as stated by the Interstate Commerce Commission, it is a matter of general public interest that it should move freely into the eastern territory. The Moffat road should not be discriminated against because it is on its line. The question of the market and demand for this coal was eliminated by the Commission in fixing these divisions. This was error. In *Hayden Bros. Coal Corporation et al. v. Denver & Salt Lake R. R. Co. et al.*, 45 I. C. C. 236, wherein the Commission fixed divisions on this coal to points in Kansas, Nebraska, Missouri and South Dakota, at page 237, it said:

"The delivering lines contend that consideration should be given to the fact that coal from the Oak Hills district displaces that which could be supplied by those roads from producing points on their own lines, and thus deprives them of a longer haul if the coal were to originate at the latter

points. But this last contention was also offered by these same carriers in the original case, and was there rejected as not being a sufficient reason for refusing to establish joint rates from Oak Hills to such destinations. Likewise, in the matter of divisions, such a proposition can not be controlling in the determination of the portion of the rate which should accrue to the delivering lines for the service which they perform on coal originating at the Oak Hills mines."

While it is true that in this case the Interstate Commerce Commission gave to the Moffat road a smaller amount than our Commission has awarded it for these intrastate shipments, it was upon a three-line haul, and the amount awarded to the delivering carrier is very much less than awarded here; also the divisions for these interstate shipments are somewhere equal in proportion to the mileage of each, while the divisions under consideration are all out of proportion to the mileage, the services rendered, or the cost of carriage. This condition is more clearly shown between the intrastate and interstate divisions on the Union Pacific for the same coal over the same line. To illustrate, in the case last cited, the through rate under consideration on coal from Oak Hills to points on the Chicago and Northwestern Railway Company hauled from Denver to Fremont, Nebraska, over the Union Pacific was $4.00, the Commission gave to the Union Pacific $2.13¾ per ton as its portion for hauling the coal a distance of five hundred twenty-five miles. By the division under consideration, it gets $2.03 for its haul for the same coal over the same line from Denver to Julesburg, a distance of one hundred ninety-five miles, yet its strategic position is just as favorable upon the Fremont haul as it is upon the Julesburg haul, so far as furnishing coal from mines upon its lines are concerned, both being upon its main line, where they can be readily supplied from its Wyoming fields. This case also discloses that under the divisions therein fixed, the Union Pacific gets more per ton per mile for its Oak Hills-Fremont haul than it gets for its Rock Springs-Fremont haul, a dis-

tance of seven hundred sixty-three miles, and much more than for its Evanston haul to Fremont, a distance of eight hundred seventy-eight miles, for which it voluntarily accepts a division of $3.00 per ton. Other similar illustrations could be shown which tend to disclose the vast discrimination under consideration. In commenting upon the former Walsenburg rate, our Commission, in its opinion, says:

"The joint rates on coal from the Walsenburg District to points on the lines of the defendants, have been in effect for many years, and as far as this Commission has been advised, the divisions of the same have been entirely satisfactory to all concerned.

The Commission feels that a condition which has been in effect for so many years, and which is so closely associated with the present case, should have some weight and be given careful consideration."

In re Rates on Lumber, etc., 31 I. C. C. 673, is cited as authority for this conclusion, also as a precedent for making the divisions the same as they were on the old rates. An examination of this case discloses that conditions are not similar. Had the respondents parallel lines to the Moffat road from Denver into the Oak Hill district and were hauling similar coal upon their own line from this district, throughout the entire distance, and the Moffat road was asking for a larger division than formerly for its haul to Denver, the Arkansas case would be applicable so far as these phases of it are concerned, and would be entitled to be given consideration accordingly. But even then as a comparison of the divisions in that case will disclose, it would not be authority to justify the divisions under consideration, besides there are other elements which enter into this case, which are ignored by the Commission which would distinguish it from that even though the product came from different directions, for instance, it appears to be conceded that the cost of carriage per mile upon the different lines in the Arkansas case was practically the same. There is a vast difference in this respect here. It

is uncontradicted that the mountainous character of the Moffat line is such that it greatly restricts the number of cars that can be handled in a train; that it requires two and sometimes three engines, over a part of the line, to haul twenty-three cars. The cost from Walsenburg is much less expensive. It is shown that one engine can haul over twice as many cars from this district as can two over the entire line of the Moffat road.

In *Coal Rates from Oak Hills, Colorado,* 35 I. C. C. 456, the Commission, in fixing the divisions between the Moffat and Rock Island road recognizes a distinction wherein in concluding its findings, it is said:

"This report deals with a particular case. It refers only to the relations between the Moffat road, and the Rock Island lines on a particular commodity, and is not intended for application to other commodities or to the relations of the Moffat road, the Rock Island, or both, with other roads. The divisions received by the initial lines in the Walsenburg district, on coal delivered to the Rock Island at Pueblo, while not as large as the constant divisions herein found reasonable for the Moffat road in connection with the Rock Island at Denver, yield much higher returns per ton-mile. We have not considered them sufficiently high to measure the divisions which the Moffat road should receive for its haul from Oak Hills to Denver. The divisions and revenues herein found reasonable for the Moffat road's services in connection with the Rock Island should not be used to measure the divisions of the carriers serving the mines at Walsenburg on coal delivered to other carriers at Pueblo or at Denver, or its own in connection with other carriers."

A comparison will disclose that the rates under consideration are all out of proportion to those fixed in the Rock Island case, when considered from a mileage basis.

There are other reasons which enter into the consideration of divisions from Walsenburg that do not apply to the Oak Hills district, which tend to show that initial carriers from Walsenburg might be willing to accept the old basis of divisions, when it would not be just to the Moffat

line. For instance, the testimony discloses that the Colorado & Southern with a line from the Walsenburg district to Denver is controlled by the Burlington, that between them it makes no difference what the divisions are, but if the Colorado & Southern joined in a request for more equal divisions, and it was granted, the Burlington would get less for its haul when the coal was received at Denver from the Denver and Rio Grande Railroad Company. There is no testimony which discloses that the Denver & Rio Grande Railroad Company is not satisfied with these divisions, but the cost of their haul from Walsenburg to Denver is materially less than that of the Moffat road from Oak Hills. The Denver & Rio Grande serves a large territory out of Denver. It takes both passengers and freight from the Burlington and Union Pacific to the south and west. To many stations on its line for shipments coming from the east on the Burlington and Union Pacific, it is in the same favorable position for exacting unequal divisions upon such shipments as the respondents are with it to stations on their lines east of Denver. The Moffat road is not thus favorably situated. So far as business from the east is concerned, it might be said that it ends nowhere and has nothing to offer, like the Denver & Rio Grande and the Colorado & Southern, when it comes to a question of barter and trade concerning divisions. For this additional reason, this discrimination against the Moffat road reached in part by a comparison of what has been agreed to between the other roads is erroneous.

The former division sheets were not submitted to the commission before the hearing, but after the arguments the commission issued an order requiring all parties to furnish them, which was done. The petitioner claims that it was relying upon the commission to decide these cases upon the record made; that it refrained from introducing its former division sheets, for the reason that it considered them incompetent and immaterial, it being admitted that the new rates were constructed on a different basis from the former ones, to-wit, for each station instead of group-

ing them. It further suggests that the previous divisions from the Walsenburg lines bear on their face evidence of bargaining between the carriers, and cite the testimony of Mr. Spens, a witness for the Burlington, in corroboration of this claim, wherein he states that they tried to get all they could. They further cite a portion of the commission's opinion, wherein it is said: "As far as this commission has been advised, the divisions of the same have been entirely satisfactory to all concerned." Counsel urge there is no evidence to that effect; that had these division sheets been in the record when the testimony was taken, so it would then have been advised that the commission would consider them, that it could and would have introduced testimony to establish that such divisions were not satisfactory to all concerned; that their lack of opportunity to produce evidence showing this and other facts concerning the original divisions was prejudicial error. *I. C. C. v. L. & N. R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, is cited as sustaining this position. The question involved was the legal sufficiency of the evidence to sustain the commission's order. The commission contended that the law imposed upon it the duty of keeping itself informed upon the condition of railroads; that for this reason it could consider the information so obtained in deciding questions involved in hearings. In answer to this, the court, at page 93, says:

"The commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evi-

dence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Counsel for respondents concede that this declaration would be applicable, had the petitioner, after notice of this order and the furnishing of those sheets, requested permission to offer further testimony and argument, and suggests that upon request the commission would undoubtedly have granted it. As counsel agree upon the rights of each to offer further testimony after the receipt of division or rate sheets, and as the case must be reversed for other reasons, it is unnecessary to pass upon the respective contentions concerning this assignment.

Respondents urge that if these divisions are fixed in amounts different than those from Walsenburg, it will require them to haul coal from Denver to the same stations east at different amounts for the same haul, depending upon which of these fields it comes from. This, they say, would present an unlawful discrimination against them. In presenting this argument, they overlook the converse of it, adopted by the commission, against the Moffat road, in their favor, and which they seek to justify, that is that in fixing the divisions for the Moffat road on coal from the Oak Hills district, the commission has fixed its division in something over fifty different amounts for the same haul, depending upon the destination of the coal. To illustrate, on the Burlington, if consigned to Derby, ten miles from Utah Junction, the Moffat road gets $1.50 per ton, but if consigned to Barr, twenty-two miles from Utah Junction, it gets but $1.303 per ton, while if consigned to Fort Morgan, a distance of eighty-two miles from Utah Junction, it gets $1.25 per ton; while if to Laird, a distance of one hundred seventy-six miles from Utah Junction, it gets $1.499 per ton, and so on. The same method is applied to the Union Pacific and Rock Island, the Moffat road being allowed, as its division, a different amount for nearly every station, though its haul is the same for each. Respondents not only make no complaint concerning this, but seek to justify it. In such case they ought not to complain when

the same results follow against them because they have different divisions with other roads fixed by agreement.

The respondents were allowed to show the proportion of cars for Moffat coal loading furnished by their respective roads for about three years prior to this hearing, it being in their favor, although gradually decreasing. They urge this as one of the reasons for the unequal division in proportion to the mileage basis. The commission accepted this as an item to be considered in deciding the question. We can not agree with this conclusion. In *Huerfano Coal Co. v. Colorado & Southeastern R. Co. et al.*, 28 I. C. C. 502, the Interstate Commerce Commission held that each carrier on a through route owes a duty to the public to furnish its proportion of cars for the traffic over the through route; that the proportion of each should be the proportion it would have to furnish if a car for car interchange was actually made at the junction points. The record shows that a large number of cars furnished by respondents were for shipments of coal to points on their lines beyond Colorado. No testimony was offered as to the number for intrastate shipments alone. For this reason, it is impossible to tell whether, even in the past, respondents have furnished more than their share for the stations under consideration. The record shows that the portion furnished by the Moffat road is increasing, but unless provided by agreement, this matter should not have any bearing on a division to be fixed by the commission for the future. The petitioner contends that this should not have been considered for the reason, among others, that the use of foreign equipment is compensated for by a *per diem* charge on each car between the roads, therefore it would be unjust to penalize, by low divisions, a road which uses a large proportion of foreign equipment when the road pays a *per diem* rental for that equipment. They cite no testimony showing such a custom, for which reason we will not consider it, but without it are of opinion that it ought not to be taken into consideration in fixing these divisions. There is no showing or promise as to what any road will do in the future in this respect.

The commission made no order concerning it. If either fails to do its share, the rule for which has been laid down by the Interstate Commerce Commission, we take it that upon complaint our commission would have jurisdiction and certainly would not require the respondents to do more than their share.

In *Wichita Board of Trade v. A., T. & S. F. Ry. Co. et al.*, 25 I. C. C. 825, in commenting upon this question, at page 631, the Interstate Commerce Commission says:

"We are not impressed by the contention of the Union Pacific that the present adjustment is necessary in order that it may retain possession of its equipment. As we have announced in previous cases, it is proper that the carriers, as between themselves, should adopt reasonable regulations calculated to induce the prompt return of cars by foreign lines, but a carrier has no right to establish regulations or fix rates with a view to controlling the direction in which its equipment shall be employed by the shipping public. *Missouri & Illinois Coal Co. v. I. C. R. R.*, 22 I. C. C. 39."

By analogy, this declaration is applicable here. In *Louisiana & P. Ry. Co. v. United States*, 209 Fed. 244, the court held that a reasonable division out of joint rates could not be denied a common carrier for transportation services by the Interstate Commerce Commission, because of any past or present derelictions, or even the fear of further violations of law.

Counsel for respondents suggest that in July, 1916, the Moffat road filed with the Public Utilities Commission a freight tariff naming its proportional rate on coal from Oak Hills district to Littleton and Englewood, viz, the Santa Fe, they say that while the tariff is not a part of the record, yet it has been filed, and that this court in reviewing the decisions of the commission should take notice of the public records of that office. In just what manner this is to be done, they do not say. Assuming that we will take judicial notice of the commission's opinions, which are furnished in pamphlet and bound volume, we can not agree that we should take notice of the records in that office. Had

counsel desired this court or the commission to consider that rate sheet, they should have offered it as evidence.

The petitioner is without terminal facilities in Denver, for which reason the commission held that out of its divisions incident to delivery to the Union Pacific and Rock Island, it must pay the twenty cents per ton charged for the switching which is performed by another company. Error is assigned to this ruling. *People's Fuel & Supply Company v. Grand Trunk Western Ry. Co. et al.*, 27 I. C. C. 24; same title, 30 I. C. C. 657, and *Waverly Oil Works Co. v. Pennsylvania R. Co. et al.*, 28 I. C. C. 621, are cited as sustaining it; while *Sloss-Sheffield Steel & Iron Co. v. L. & N. R. R. Co.*, 35 I. C. C. 460, is relied upon as holding to the contrary. The rule announced in the cases first cited appears to be the general one (of course with exceptions) followed by the Interstate Commerce Commission. We can not agree that the testimony was insufficient to justify its adoption here. We do not concur, however, when applied to this case, in the quotation cited from the first of these cases, which reads:

"If it can not afford to pay for the terminal services which other * * * carriers provide, it will doubtless have to retire from competitive traffic."

The day when this quotation was applicable in a case of this kind has gone by. Since rate-making power, as well as fixing the divisions, has been lodged in commissions both state and federal, the carriers are not at liberty to retire from a rate or division fixed by the commission so that shippers on their lines will have no opportunity to compete with those on others. The carrier's remedy, as adopted here, is by an appeal to the commission and then to the courts.

In harmony with the rule followed in *Interstate Commerce Commission v. Union Pacific Railroad Company et al.*, 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108, we have given all the testimony, including the comparison of these divisions with divisions upon other roads and on these in interstate shipments, as well as the deductions sought to

be drawn therefrom, together with all other competent testimony, careful consideration. To summarize, our conclusions are that for the reasons and in the particulars above stated, the commission erred, as a matter of law, in considering and giving effect to facts which should have no bearing upon the question, and in failing to consider and give effect to other facts which were entitled to consideration; that their order is not supported by any substantial testimony; that it is not in accordance with the evidence, and that when tested by the uncontradicted testimony, it is unjust and unreasonable. Their conclusions in these respects involve errors of law. *Louisville & N. R. Co. v. United States,* 227 Fed. 258; *Louisville & N. R. Co. v. United States,* 216 Fed. 672.

The petitioner calls our attention to that portion of section 52 of our Utilities Act which says:

"Upon hearing, the Supreme Court shall enter judgment either affirming, setting aside, or modifying the order or decision of the commission."

It contends the testimony discloses that the divisions should be in certain amounts, stating them, and that the above language is authority for us to, and that we should, modify the order of the commission by fixing the divisions in these amounts. We can not agree with this position. This court is not a rate-making tribunal and the language quoted was not intended to make it such. The authority to do this is vested in the commission, with the right to a review by this court. We are not only not authorized to fix a division, but feel it our duty, and have attempted to discuss the points under consideration in a manner that will not disclose our personal views upon the weight to be given any competent testimony, or the result that should follow, and thereby embarrass the commission in its determination of these questions, when considered under correct principles of law.

For the reasons stated, the decision and order of the commission will be reversed and set aside and the cause

remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Decision *en banc.*

Mr. Justice White and Mr. Justice Bailey not participating.

No. 8939.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL. *v.* PUBLIC UTILITIES COMMISSION ET AL.

PUBLIC UTILITIES COMMISSION—*Order Reversed.* Appeal from the order of the Public Utilities Commission controlled by the opinion in No. 8939, *ante*, so far as the questions presented are identical or similar.

An order of the Commission allowing to one company a greater rate, for the shorter haul, than that awarded to another, for the longer haul,—over the same road—vacated as not supported by the testimony, and contrary to all reason.

Error to the Public Utilities Commission.

Mr. WILLIAM V. HODGES, Mr. WALLACE T. HUGHES, Mr. D. EDGAR WILSON, Mr. HAROLD H. HEALY, Mr. M. F. BELL, of counsel, for petitioner.

Mr. TYSON S. DINES, Mr. TYSON DINES JR., Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGL, for respondent, The Denver & Salt Lake Railroad Company.

Chief Justice Hill delivered the opinion of the court:

THIS action is to review an order of our Public Utilities Commission fixing divisions of through rates on coal to be shipped from points in northwestern Colorado, known as the Oak Hills district, on the road of the respondent, The Denver & Salt Lake Railroad Company, called "the Moffat road," to points in eastern Colorado, on the road of the petitioner, The Chicago, Rock Island & Pacific Railway Company, called "the Rock Island."

When before the Public Utilities Commission, this case was a part of our No. 8938, decided at this term. Both

roads were dissatisfied with the commission's divisions, and asked for reviews, the Moffat road in the other case, the Rock Island in this. We allowed one record for both. In the other case, the Rock Island joined in the briefs in so far as its contentions were the same as the other roads', hence the opinion in that case controls those questions.

In this case, it urges the consideration of facts in its favor which it claims distinguishes its position from that of the Union Pacific and Burlington, for which reasons different results should be reached concerning its divisions.

Regardless of the contention in the other case urged by the respondents other than the Rock Island, that we were without jurisdiction to consider these questions, etc., the Rock Island requests us in this case to not only assume jurisdiction, but to consider the evidence, to determine the evidentiary degree of certain testimony, to hold that the commission erred concerning it, to declare that its order is unjust and unreasonable, etc., to set aside its decision and make a finding from the testimony that its divisions should be in amounts as claimed by it. We can not subscribe to all of these contentions, but agree with those portions recognized as correct in the former opinion, viz, that is that it is our duty to examine the testimony in order to determine whether there is competent testimony to support the findings of the commission and whether the commission's order is just and reasonable. This, the statute says, we shall do.

For the reasons stated in Case No. 8938, we find no substantial conflict in any material testimony concerning the questions under consideration. The commission held that, as between the Moffat, the Burlington and the Union Pacific roads, the divisions of the new lower rate fixed by it should be prorated in the same proportion as the former divisions, each bearing its proportional share of the reduction; that the divisions between the Moffat and the Rock Island for stations on the Rock Island line east of Limon should be on a parity with the divisions fixed for the Burlington and the Union Pacific out of Denver, although some

of them were fixed at less than this conclusion calls for. These are the alleged errors complained of as being in conflict with both the law and the evidence. To sustain its contention to the first, the Rock Island points to testimony which shows that it had been receiving a greater portion for its divisions out of the old rates than had the Burlington and the Union Pacific, hence the divisions to it out of the new rates are not fixed in the same proportion as the former divisions. Its justification for these prior divisions, and right to the same divisions here, is prior agreement to the former divisions, strategic position, agreements with other roads from the Walsenburg district to certain divisions, acquiescence by them to the same proportions of the new rates, etc.; also, the fact that while the Rock Island receives Oak Hills coal at Denver, it receives Walsenburg coal at Pueblo, one hundred eighteen miles south of Denver; that the Rock Island extends east from Colorado Springs, crossing the Union Pacific at Limon, seventy-nine miles distant; that it uses the rails of the Union Pacific from Limon direct to Denver, eighty-nine miles, and pays wheelage to the Union Pacific for the use of this track; that it enters Pueblo over the rails of the Denver & Rio Grande, to which company it pays wheelage charges of forty-four miles to Colorado Springs; that the Walsenburg haul by the initial carrier to Pueblo is but sixty-eight miles, then one hundred twenty-three miles by the Rock Island from Pueblo to Limon, a total of one hundred ninety-one miles from Walsenburg; that the Rock Island's haul from Denver to Limon is but eighty-nine miles; that its service from Limon east is the same whether the coal originates at Oak Hills or Walsenburg, hence the greater revenue to it upon the Walsenburg haul. For these reasons, it claims to be entitled to a larger division of the through rate on Oak Hills coal than either the Burlington or Union Pacific, and urges that the commission erred as a matter of law in holding otherwise.

In presenting these contentions, the petitioner ignores the distance of the haul from the Oak Hills district, the serv-

ices rendered in such carriage, the demand for the Moffat coal by the public, the injustice of the former rates (so found by the commission, from which no appeal was taken), that the lower rate was fixed by the commission, that in its general adjustments of these rates it did not reduce the Moffat's local rate to Denver, that the evidence discloses that this local rate was very reasonable, when based on distance and cost of haul. The petitioner also ignores the reasons for the agreements on divisions by other carriers with it, and other matters set forth in Case No. 8938, also the fact that the former divisions and subsequent agreement by other carriers pertaining to the new rate are not controlling of this controversy. In addition, the Moffat road earnestly insists that it never agreed with the Rock Island on a division of the former rates and cites testimony to prove it, which is to the effect that while it shipped coal to these points, it accepted the amounts given it by the Rock Island under protest and had claims pending for the difference. If there is any disputed question of fact in the entire record, it is this, but, conceding that the Rock Island's position is correct concerning it, it is not controlling of the controversy.

The Interstate Commerce Commission has fixed the same divisions for the Moffat road for interstate shipments from the Oak Hills district to points east of Colorado over the Rock Island, in both two and three-line hauls, as it has for similar shipments to points east of Colorado over the Burlington and the Union Pacific. For all of these reasons, as well as those stated in Case No. 8938, we can not agree with the petitioner that there is no testimony to sustain the commission in fixing these divisions upon the same basis as those for the Burlington and the Union Pacific through the Denver gateway, when they are ultimately established under correct principles of law.

The petitioner makes the further contention that, accepting the basis of the Union Pacific and the Burlington divisions as controlling upon its shipments through the Denver gateway, the order of the commission is still unjust, un-

reasonable and discriminative against it, in this, that the commission has awarded to it smaller divisions than to the Union Pacific for practically the same hauls and distances. They point to testimony which discloses that Limon is eighty-nine miles from Denver, between which points the Union Pacific and the Rock Island use the same track; that from there east they closely parallel each other, but that the divisions awarded the Rock Island for the same distance east of Limon are lower than to the Union Pacific. To illustrate, the Union Pacific's division for Oak Hills shipments from Denver to Limon is $1.325; to Lake, the first station east of Limon on the Union Pacific, its division is $1.367; while to Mustang, the first station east of Limon on the Rock Island, but three miles difference in distance, its division is $1.219, and less than the Union Pacific's for the shorter haul to Limon over the same line; Hugo, on the Union Pacific east of Limon, is one hundred and three, while Bovina, on the Rock Island, also east of Limon, is one hundred and six miles from Denver, both through the Limon gateway, yet the Union Pacific is awarded $1.50 per ton as its division to Hugo, while the Rock Island is only given $1.294 as its division to Bovina, and that this discrimination thus continues to the Kansas line. We agree with the petitioner that there is no testimony which justified this discrimination, or which tended to disclose that there should be any difference in the divisions between these lines for the same distance on either line through the Limon gateway, and there has been no reason presented which justifies it.

For the reasons herein stated, as well as those in Case No. 8938, the decision and order of the commission will be set aside and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Decision *en banc*.

Mr. Justice White and Mr. Justice Bailey not participating.

No. 8964.

DELTA LAND & ORCHARD COMPANY ET AL. *v.* ZANINETTI ET AL.

1. DEED—*Effect.* In an action for the recovery of lands in an irrigation district, under a tax deed, judgment may, under sec. 22 c. 109 of the Laws of 1915 be given, that defendant within a time limited pay into court the tax and interest evidenced by the deed, and the cost of its execution and record, and that in default of such payment plaintiff is declared the owner of the land, and entitled to possession;—and this, even though the deed is void upon its face. *Dussart v. Abdo. Co.*, 57 Colo. 423, and *Silford v. Stratton*, 54 Colo. 248, distinguished.
2. CONSTITUTIONAL LAW—*Regularity of Tax Deed*, is subject of legislative control. The final provision of sec. 22 of c. 109 of the Acts of 1915, is not unconstitutional.

Error to Delta District Court, Hon. Thomas J. Black, Judge.

Messrs. PLUMB & BURNETT, Mr. JOHN F. MAIL, for plaintiffs in error.

Mr. THOMAS Y. BRADSHAW, Mr. WILLARD FAIRLAMB, for defendants in error.

Chief Justice Hill delivered the opinion of the court:

THIS suit was brought by claimants under a tax deed for possession of lands situate in an irrigation district. The court found that the only issues raised were such as go to the regularity of the plaintiffs' deed; that the defendants had not paid the taxes, interest, penalties and cost due upon the plaintiffs' certificate of purchase, and incurred in the taking out of plaintiffs' tax deed, for which reason that they were without right to attack its validity. It also found that the deed was void upon its face, for the reason that non-contiguous tracts were sold en masse. The judgment was to the effect that the defendants, within thirty days, be required to pay into court the amount of taxes and interest evidenced by the tax deed, and the expenses incurred for its execution and recording; that unless they did so within said time, that the plaintiffs be adjudged to own the land, and are adjudged the right to possession, etc.

It is urged that as the suit was for the recovery of possession of land, that the judgment did not comply with the provisions of section 288, Revised Code 1908, covering such cases, for which reason it is void. We agree that the judgment is not in compliance with the provisions of section 288, *supra*, and was not intended to be. It can not be successfully claimed that it is not authorized by the provisions of section 22, chapter 109, pages 315-318, Laws 1915, unless it might be suggested that it is more favorable to the defendants than this section warrants, which, of course, they are not in a position to raise.

It is claimed that the portion of section 22, *supra*, followed by the court is unconstitutional, in that it denies to the defendants due process of law, and that the court erred in receiving the tax deed in evidence for any purpose upon account of its being void on its face. That portion of section 22, *supra*, under which the court acted and necessary to consider, reads:

"In any case in which the claimant has title or color of title to land in an irrigation district under a tax deed duly recorded, and shall bring his suit for possession of or to quiet title to such lands, the invalidity or alleged invalidity or insufficiency of the tax deed shall not be a sufficient defense after the expiration of five years from and after the execution, delivery and record of said tax deed, nor, if such defense is pleaded prior to the expiration of said five years, shall the invalidity or insufficiency of the tax deed be considered by the court as a defense, unless defendant shall first deposit with the clerk of the court in which said suit is brought a sufficient amount to pay the taxes, interest, expenses and penalties, including the amount of subsequent taxes, and interest at eight per cent per annum, paid on account of such tax sale, for the benefit of and to be paid to the person or persons entitled thereto, when ascertained by the judgment in said suit."

The cases cited do not sustain the contention that this section works a denial of due process of law. The regularity of a tax deed is a matter of legislative control. Former

statutes provide that a deed in a certain form shall be *prima facie* evidence of certain facts. This one provides in a suit of this kind that its invalidity or insufficiency shall not be considered by the court as a defense, unless the defendants shall first deposit with the clerk a sufficient amount to pay the taxes, etc. Being the latest legislative declaration on the subject, it, of necessity, repeals any portion of any prior act in conflict with it.

The claim that it deprives the landowner of the right in this suit to raise the question of the invalidity of a portion of the tax, if true, does not, for that reason, deny unto him due process of law. Our revenue laws provide a complete method of procedure concerning the assessment, levying and collection of taxes, including the right to landowners, at certain times and places, to be heard before proper tribunals upon all of these questions. Section 5750, Revised Statutes 1908, provides that when he pays any tax thereafter found to be erroneous or illegal, that the county shall refund the same without abatement or discount. This court has repeatedly construed this section as giving him a cause of action against the county for any tax, the validity of which he, at that time, has the right to question, and that our revenue laws, including this section, gives to him due process of law concerning the validity of any tax imposed upon his land. *Bent County v. Santa Fe Co.*, 52 Colo. 609, 125 Pac. 528; *Nile Irri. Dist. v. English et al.*, 60 Colo. 406, 153 Pac. 760.

Dussart v. Abdo Company, 57 Colo. 423, 140 Pac. 806, and *Silford v. Stratton*, 54 Colo. 248, 130 Pac. 327, are relied on as sustaining the contention that the court was without power in this action to order the defendants to pay this tax. One difficulty with this contention is, that the order of the court was not absolute, but conditional, that if defendants wished to take advantage of the invalidity of the tax deed, they must first pay the tax, etc. The first of these cases has no application to a contention of this kind. The second is to the effect that a personal action will not lie against the owner in favor of a tax title

claimant to collect the amount of a tax on real estate after an invalid sale. It is not applicable here for two reasons; first, the suit was not to collect the tax from the owner, but for possession of the land under the tax deed; second, the 1915 act was not in existence when the former suit was heard. Its passage was evidently for the purpose of assisting the counties to secure purchasers at tax sales for lands in irrigation districts, in order to better enable not only the state and counties, but such districts, to secure their taxes, so that their affairs may not be crippled by the failure of landowners to pay them; otherwise, if the position of the defendants is sustained, tax sale purchasers for such lands where the amounts are large might be lacking and both county and district revenues become endangered upon account thereof.

Section 5733, Revised Statutes 1908, provides as a prerequisite to a recovery of lands by the owner against one claiming under an invalid tax deed, that he must pay the tax title claimant the amount for which the lands were sold, with interest, etc. *Rustin v. M. & M. Tunnel Co.*, 23 Colo. 351, 47 Pac. 300.

The 1915 act, among other things, extends the substance of this equitable doctrine to suits by tax deed claimants for possession of lands in irrigation districts, by providing that before the owner can question the validity or regularity of the tax deed. he must pay the amount of the taxes, etc. Such procedure is a matter of legislative control. *Crisman v. Johnson*, 23 Colo. 264.

The judgment is affirmed.

Affirmed.

En banc.

No. 8968.

CONTINENTAL AUDIT COMPANY *v.* WOODMEN OF THE WORLD.

PAYMENT—*Evidence.* Two accountants united in practicing their profession. While so associated one rendered service to a patron. Payment to him for the service held a satisfaction of

the demand, though in the meantime he had assigned his interest in the joint account to his associate.

Error to Denver District Court, Hon. A. W. McHendrie, Judge.

Mr. THOMAS E. WATTERS, for plaintiff in error.

Mr. GEORGE P. STEELE, Mr. HENRY A. LINDSLEY and Mr. WALTER E. SCHWED, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS action was by the plaintiff in error, plaintiff below, to recover from the defendant the sum of $120.00, for services rendered in the matter of auditing the books of defendant. There is no dispute as to amount, but payment is pleaded as the defense, and this plea was sustained by the trial court and the cause dismissed. The plaintiff is a corporation with an authorized and issued capital stock of one hundred shares. Of this, Fermor J. Spencer, who is the president of the company, owned forty-nine and one-half shares, and Edwin F. Arthur, who was the secretary and treasurer of the company, owned an equal amount. John W. Springer was the owner of the remaining one share, held for the apparent purpose of qualifying him to act as a director. The business was in fact that of Spencer and Arthur, and if there was ever any business transacted by the board of directors, acting as such, it does not appear in the record. It appears that Arthur had the direct and active charge of the office business.

It is agreed that he made contracts for services, and collected and paid the bills of the company generally. Dissatisfaction arose between the two principals; Arthur became ill, and Spencer addressed him a letter on September 30th, 1914, suggesting that he might sell to Arthur his interest, or purchase the interest of Arthur. This seemed to be agreeable to Arthur, and the two met on the 23rd of October and consummated an arrangement whereby Arthur sold his entire interest to Spencer for the lump sum of $2,426.00. In the meantime, and before the sale was con-

summated, and on the 14th day of October, Arthur addressed the following letter to the defendant in error:

"Denver, October 14, 1914.

To The Board of Managers,
Woodmen of the World,
Denver, Colo.

Gentlemen:

The Continental Audit Company asks your permission to cancel their arrangement for the audit of your books for the current year.

Mr. E. F. Arthur, who is retiring from this company, will assume the obligation and collect for the service rendered so far this year.

Respectfully,
The Continental Audit Co.,
By E. F. Arthur, Secretary."

This seems to have been accepted by the defendant, and Arthur then charged his own account with the $120.00 due from defendant, which entry appeared on the books of the Audit Company at the time of the closing of the deal between Arthur and Spencer.

The defendant afterward paid Arthur the said sum, though Spencer had notified it of the company's claim to the money. At the time of the sale by Arthur to Spencer, the company was indebted to Arthur for salary in the sum of $700, which credit went to Spencer, with Arthur's interest in the business, but which was not computed as an item in the basis of settlement.

The Audit Company, as conducted by Spencer, acquiesced in the arrangement contained in the letter of the Audit Company, written by Arthur to the defendant, in so far as it related to the cancellation of the contract of employment, but denied the right of Arthur to collect the $120.00 then due. Fraud is not suggested either in the pleadings or proof.

It appears that Arthur, acting for his company, entered into the original contract with the defendant, and likewise made the agreement for its cancellation, as he apparently

had the authority to do, and the court found from all the evidence that Arthur had the authority to do all the things he did in the premises, and that the defendant was justified in dealing with him and in the matter of the payment of the money which it owed.

We think there was sufficient evidence to sustain this finding and the judgment is therefore affirmed.

Judgment affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 8971.

ZEIGLER v. BUTLER.

REAL ESTATE BROKER—*Right to Commissions.* Defendant employed plantiff to negotiate for him an exchange of houses which he owned, for a stock of goods in another locality. Plaintiff visited and examined the goods, and at his instance the owner of the stock visited and examined the houses. Defendant afterwards himself went to the site of the goods, and made an examination of them, and the exchange was finally consummated, defendant being allowed for the houses the valuation he had originally placed thereon. *Held* that plaintiff's refusal to attend defendant in his visit to the place where the goods were, was no abandonment of his agency, nor of any duty resting upon him, and that neither this omission, nor expressions to third persons of indifference as to the result of the negotiation, manifesting impatience at defendant's delays, in any manner deprive plaintiff of his commissions.

Error to Prowers County Court, Hon. C. B. Thoman, Judge.

Messrs. GORDON & GORDON, for plaintiff in error.

Mr. O. G. HESS and Mr. FRED W. CUCKOW, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS action is by the plaintiff in error, plaintiff below, to recover a broker's commission for the negotiation of a sale or trade of certain real estate for the defendant.

The defendant owned two houses in the city of Lamar, which he valued at three thousand dollars. He learned,

through plaintiff, of a stock of groceries for trade at Sugar City. He asked plaintiff to negotiate a trade of his houses for the stock of goods. This plaintiff proceeded to do, with the result that the owner of the goods sent an agent to Lamar, who, in company with the plaintiff, inspected defendant's property. Afterward the owner of the stock of goods asked defendant to come to Sugar City and inspect the same. This the defendant did, and while in Sugar City the trade was consummated. The houses of defendant were taken in on the trade at the value of three thousand dollars. The goods were exchanged at invoice price.

Upon the conclusion of plaintiff's evidence the court, upon motion of defendant, directed a verdict for defendant. In sustaining the motion for a directed verdict, the court found:

"It is my opinion that this plaintiff did abandon his agency by his refusal to accompany Mr. Butler to make that trade, and he further proved that abandonment by his statement, as he himself has admitted, that he didn't care whether the trade was made or not, whether or not it was made in Mr. Butler's presence, or whether it was made in the presence of others, it was made, and it is not denied, and it is my opinion that the motion to instruct the jury to find a verdict for the defendant should be sustained."

This was error. The finding admits the employment, concerning which there is no doubt, and the mere alleged statement of plaintiff did not constitute abandonment of his agreement.

The statement was not made to defendant, but to a disinterested party, at a time when plaintiff was impatient with defendant's delay, but the defendant proceeded thereafter and the trade was consummated as stated.

It appears that when defendant was about to go to Sugar City to make the inspection of the goods, he invited plaintiff to go with him. This plaintiff declined for the reason stated that he had inspected the stock, and that defendant must necessarily act upon his own judgment in that respect.

It is urged that this also constituted an abandonment by

plaintiff of his employment. It was no part of plaintiff's duty to again inspect the stock of goods. The acceptance or rejection of the merchandise was solely with defendant, and he acted accordingly. Beside, the defendant at no time prior to the trial denied his liability, but on the contrary complained only of the amount demanded by plaintiff for his services, and tendered him fifty dollars.

The plaintiff did all that he was required to do under the law. The judgment is reversed, with instruction to proceed in accordance with the views herein expressed.

Judgment reversed.

Hill, C. J., and Garrigues, J., concur.

No. 8973.

EMERSON-BRANTINGHAM IMPLEMENT COMPANY v. SYLVESTER.

1. PRINCIPAL AND AGENT—*Agent with Limited Authority.* Where a transaction is conducted and concluded, or expressly authorized and approved by the principal office of a corporation, the fact that it was instituted by a local agent will not entitle the principal to avail of any limitations in the authority of the latter.
2. EQUITY—*Jurisdiction.* The defendant sold a bill of machinery to one H., the plaintiff becoming surety for H., for a portion of the amount, with the stipulation that when H. had paid a sum equal to that for which plaintiff stood as surety, plaintiff should be discharged. H. having paid a larger sum defendant refused to discharge plaintiff threatening an assignment of the notes to third parties, a judgment by confession, and other troubles. *Held*, that plaintiff was not required to await action of the defendant but might have his bill in equity to compel his discharge, and restrain the proceedings threatened by defendant.

Error to Weld District Court, Hon. Neil F. Graham, Judge.

Mr. FRANK L. GRANT, for plaintiff in error.

Mr. JOSEPH C. EWING, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

This is an action by the defendant in error to enjoin the collection as against him, and for the cancellation of his liability thereon, of four promissory notes signed by him as surety for one A. J. Hoover, aggregating the sum of $1,882.33. The case was tried to the court without a jury, and judgment rendered in accordance with the prayer of the complaint, which judgment is before us for review.

The testimony shows that plaintiff in error, through its agents, undertook to and did sell to the said A. J. Hoover a certain threshing machine and separator, for the total sum of $4,911.00, $500.00 of which was paid in cash, and the remainder by deferred payment notes. Sylvester signed but four of these notes, and in the aggregate sum of $1,882.33. In the negotiation for the sale, the Implement Company declined to accept Hoover alone for the payment of the total price for the machinery so purchased, and it was finally agreed that if Hoover could get some one financially responsible to sign notes, in the amount above stated, as involved in this suit, the sale would be consummated. The entire property so sold was to be covered by chattel mortgage on all the machinery.

The plaintiff was induced by Hoover and the company's agents to sign the notes to the extent stated, but not until he had secured the agreement that he was to be entirely released from the obligation, when Hoover should have paid on the entire purchase price a sum equal to $1,882.33, being the total amount represented by the notes he was to sign.

Sylvester joined Hoover in signing the application contract of purchase, to the extent of making a property statement, and there was written on the margin of this contract application, at the time and before Sylvester signed it, the following condition: "Sylvester is to be released as soon as $1,882.33 is paid on the Big Four engine and A-1 Geiser separator."

The machinery thus described was all that was included in the purchase price of $4,911.00. This application contract was forwarded to the branch house of the machinery company at Denver and accepted. Afterward the notes

were executed, and on the notes signed by Sylvester there was written on the back of each note the same words as in Sylvester's release upon the application contract. These notes were returned to the local agents of the company by the Denver branch office of the company, with the request that this provision as to the release of Sylvester should not be written on the notes, but on a slip of paper to be attached to the notes. Duplicate forms of notes were returned the local agents for that purpose, and Hoover and Sylvester signed them; the four notes were pinned together with a slip of paper on which was written the same provision concerning the release of Sylvester.

It is admitted that Hoover had paid about $2,500 on his contract, at least an amount in excess of his agreement, in addition to the cash payment, but that the machinery company had given the credit therefor upon the notes signed by Hoover alone, and insisted on the payment by Sylvester of each of the notes in full as signed by him.

Each of the notes contained the following confession of judgment and waiver clause:

"We hereby authorize and empower any attorney-at-law, at any time after interest or principal in this note becomes due, to appear for us before any court of record in the State of Colorado, or elsewhere, and waive the issuing and service of process upon us, entering our appearance therein and confess judgment against us and in favor of said Emerson-Brantingham Implement Company, payee, or its assigns, for said sum, interest and costs, including any attorney fee of ten per cent, and thereupon to release any and all error, and waive all right and benefit of a second trial or appeal in our behalf, also waiving the right of exemption and stay of execution. We also waive any and all notice of protest for non-payment; and in case the principal is not paid when due, we agree to pay a ten per cent attorney fee, whether suit is instituted on this note or not."

The machinery was delivered to and accepted by Hoover under this arrangement.

The statements of fact, as above set forth, were testified to by Sylvester and Hoover, and by Blystone, the soliciting agent of the company, and by E. H. Soper, engaged in the agricultural implement business, at Greeley, likewise a local agent of the machinery company, and all of whom assisted in the consummation of the agreement, and were cognizant of the facts.

The first contention of plaintiff in error is that there is not sufficient proof to sustain the finding by the court.

There is the positive testimony of Sylvester and Hoover and of the company's agents, Blystone and Soper, all in agreement and not contradicted as to the facts stated. But it is contended that Sylvester knew he was dealing with an agent of limited authority and failed to show any contract, with the marginal limitation which he claims to have signed and relied on, and which he says was pinned to the notes by the agent, or that these matters reached the company or were acted on by it.

The provision for release written on the margin of the contract did not appear on the instrument when offered in evidence, but it is plain from the evidence that the notes with the release written on the back were returned to Blystone, accompanied by a letter of instruction from the branch office of the company, asking the provision for release be written on a separate sheet of paper. Blystone testifies that he received this letter; Soper testifies that he read it; and both testify that they and plaintiff acted on it.

There is no suggestion that the Denver branch office of the company was without authority to so agree. The court was clearly justified in finding that this was with the knowledge of the company and in fact by its authority. Therefore the question of alleged limited authority of the local and soliciting agents is not involved and will not be discussed.

It is further contended that the complaint was insufficient in that it did not contain the essential allegations of a suit in equity. The complaint was not attacked by demurrer

or otherwise on this ground prior to the trial. But we think it is sufficient to sustain the action.

The complaint further alleged that the company, notwithstanding the premises and a full compliance with plaintiff's obligation, it willfully refused to recognize said agreement, and was attempting to enforce the collection of the said notes against him, and threatened to cause to be entered a confession judgment against him, and to sell the same before maturity to an innocent purchaser, and to otherwise harass him.

There was also the allegation of no complete, adequate or speedy remedy at law. We think that jurisdiction of courts of equity in this class of cases is well settled in this jurisdiction. *Travelers' Ins. Co. v. Jones,* 16 Colo. 515, 27 Pac. 807.

The reason for the rule is well stated in the early case of *Cornish v. Bryan,* 10 N. J. Eq. 146, where it was said that if a party holds an obligation which ought to be cancelled, and persists in holding it for the purpose of harassing the obligor with a suit, he ought not to be permitted to select his own time, place and circumstances for such prosecution. And that the mere fact that the grounds upon which the jurisdiction of a court is invoked may avail the party in such a case, in an action at law, and constitute a valid defense by plea or otherwise, is not a sound objection to the court's exercise of equity power.

In a precisely similar case, and likewise involving a judgment note, it was said in *Ginsbert v. Rubinowitz,* 20 Pa. Co. Co. 230:

"The serious question in this case is whether a court of equity has jurisdiction, and will intervene to prevent the confession of judgment on a note of this character and compel the holder to deliver it up for cancellation. That the defendant has no right to make any use whatsoever of the note is free from doubt, and that the plaintiff is entitled to have it surrendered and cancelled is clear and beyond dispute. In these circumstances must the plaintiff await an improper use of the note before he can move to assert

his rights in the premises, and then be compelled to invoke the equitable powers of the court to save him from the consequences of the defendant's wrongful act? It is in the power of the defendant, at his pleasure, to make it both expensive and inconvenient for plaintiff to defend himself against an attempt to collect this note, and the lapse of time may not only weaken, but actually defeat his defense to it. Moreover, the constant annoyance and hazard to which the plaintiff is subject by this outstanding note, in the hands of one who can assign no valid reason for retaining it, is calculated to harass and distress the plaintiff, and to do him irreparable injury."

The view we have taken in this respect is sustained by the great weight of authority.

The judgment is affirmed.

En banc.

No. 8977.

DAVIDSON v. THE PEOPLE.

CRIMINAL LAW—*Fomer Jeopardy.* Two counts of the information charged the same offense. After the conclusion of the testimony the District Attorney abandoned the first count, and a formal verdict of not guilty was returned thereto, under the direction of the court, and a formal judgment of acquittal entered.

Held a bar to a conviction under the second count.

Error to El Paso District Court, Hon. J. W. Sheafor, Judge.

Mr. JOHN J. MORRISSEY, Mr. WILLIAM H. SCOFIELD, Mr. CHARLES T. MAHONEY, Mr. JOSEPH J. WALSH, of counsel, for plaintiff in error.

Hon. FRED FARRAR, attorney general; Mr. W. B. MORGAN, assistant attorney general; Hon. LESLIE E. HUBBARD, attorney general; Mr. BERTRAM B. BESHOAR, assistant attorney general, for the people.

Mr. Justice Bailey delivered the opinion of the court.

THIS case arises out of a prosecution for alleged conspiracy. The information was in two counts. Defendant was convicted on the second count in the District Court of the City and County of Denver, and was granted a new trial. Upon motion, change of venue was had, and a second trial in El Paso County resulted in a disagreement of the jury. Defendant at third trial was found guilty upon the second count of the information, from which verdict and judgment he brings the case here for review on error.

The two counts in the information are admittedly descriptive of the same offense; the defendant is charged with conspiring with the same persons, on the same date, for the purpose of obtaining money from the same prosecuting witness, by means of the same false pretenses. He was placed on trial on both counts. At the close of the evidence he moved that the People be required to elect upon which count they would rely. No ruling was made upon the motion at that time, but prior to the giving of instructions, and after all the testimony was in, the court required the People to elect. The district attorney thereupon abandoned the first count, and as to it a formal verdict of not guilty was returned by the jury under direction of the court, and a formal judgment of acquittal entered accordingly.

At the second trial defendant entered a plea of former jeopardy, upon the theory that, as the first count admittedly described and referred to the same offense as that set out in the second count, acquittal upon the first count was tantamount to acquittal upon the whole information. Demurrer to this plea was interposed by the People, and sustained. On the same grounds the plea of former jeopardy was again interposed at the last trial of defendant, and its sufficiency again denied. That ruling, among others, is assigned as ground for reversal of the judgment.

In discussing the defense of *autrefois acquit,* it is said in 8 R. C. L., at page 134:

"It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by elementary writers, and courts of judicature from a very

early period down to the present time, that a man shall not be brought into danger of his life or limb for one and the same offense, more than once. This rule not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, and whether in a former trial he has been acquitted or convicted. * * * The right not to be put in jeopardy a second time for the same cause is as important as the right of trial by jury, and is guarded with as much care. Accordingly, there will be found in the Constitution of the United States, and in the constitutions of most of the states, a provision that no person shall for the same offense be twice put in jeopardy, which, however, is but a recognition of the humane rule of the common law, and a plea of former conviction is good either under the constitution or the common law. The protection thus afforded is not against the peril of second punishment, but against being again tried for the same offense."

This common law rule is recognized in the Constitution of this state in Article II, Section 18, which provides:

"Nor shall any person be twice put in jeopardy for the same offense."

In *Carson v. People,* 4 Colo. App. 463, 36 Pac. 551, the rule is established that former conviction or acquittal is a bar to subsequent indictment or information for an offense for which defendant might have been convicted under the indictment and testimony in the first case. It also bars subsequent indictment for an offense which involves the same elements as those previously resolved in favor of defendant.

In *Roland v. People,* 23 Colo. 283, 47 Pac. 269, defendant was charged with larceny of a heifer, the property of a certain named co-partnership. In the second count of the information he was charged with the larceny of the same animal as the property of some person unknown. At the first trial the state was unable to prove ownership of the heifer in the co-partnership, and the court held that the

evidence was insufficient to convict on that count, and directed an acquittal thereon. The jury as to the second count disagreed. Upon a second trial, on both counts, defendant was convicted on the first, under which the court had theretofore directed an acquittal. A plea of former jeopardy was interposed, but disallowed. This court, at page 286, said:

"Section 18, article 2, of our bill of rights, protects a person against a second jeopardy for the same offense. That the defendant was put in jeopardy upon the first trial for the offense charged in the first count of the information admits of no doubt; and that the action of the court below in withdrawing that count from the consideration of the jury on account of the insufficiency of the evidence to sustain a conviction of the offense therein charged was equivalent to an acquittal of the defendant thereof is well settled by the current of authority. In *Mount v. State,* 14 Ohio 295, a case similar to the one at bar, the Supreme Court of Ohio used the following language: 'There can, we think, be no question of the right of the state, after the jury are sworn, to abandon any count, of all the counts of an indictment, even against the defendant's consent; but abandonment can not be held to be anything more than the expression of the opinion of the legal authority of the state, on the insufficiency of the evidence to produce conviction, in the case made; and it is equivalent to an acquittal. It justifies and requires from the jury, with the sanction of the court, a verdict of not guilty, and the prisoner may of right demand it. An abandonment, therefore, of a criminal prosecution, after the jury is sworn, is tantamount to an acquittal, and the effect is the same (citing authorities).' "

To be sufficient in law the plea of *autrefois acquit* must be based upon the fact that the matter set out in the second indictment or information is such as would be admissible and sustain a conviction, under the first. *Dill v. People,* 19 Colo. 469, 36 Pac. 229; *Davis v. People,* 22 Colo. 1, 43 Pac. 122. The rule is stated in 12 Cyc. 280, in the following language:

"A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar."

In 8 R. C. L. 138, the circumstances under which legal jeopardy arises are detailed as follows:

"A person is in legal jeopardy when he is put in trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance."

In the case at bar judgment of acquittal upon the first count of the information was entered after the jury had been sworn, and the testimony was all in. It is admitted by the district attorney that the first and second counts of the information are descriptive of precisely the same offense. Having been thus acquitted of the offense charged in the first count, defendant can not be convicted of the same offense, simply because it is set out in slightly different verbiage in the second count of the information. This is equally true whether the offense is charged in different and wholly independent informations, or is set out in separate counts in one and the same information.

The judgment of the lower court is reversed, and the cause remanded, with directions to dismiss the action.

Decision *en banc*.

No. 9047.

BANK OF CENTER ET AL. *v.* CAIN.

1. STATE LANDS—*Assignment—Approval of State Board. Semble* that the approval of the State Land Board is a condition precedent to the right to assign a lease of state lands.

2. ESCROW—*Depository Bound by Terms of Deposit.* A bank which, having received documents in escrow, delivers them, in violation of the terms of the escrow, is liable.
3. —— *Conditions,* may be defined by a letter transmitting the documents deposited.
4. CONTRACTS—*Construed.* Two contracts relating to the same matter, the first in writing and the second in parol, and supplemental to the first, may both stand.

Error to Rio Grande District Court, Hon. A. Watson McHendrie, Judge.

Mr. JESSE STEPHENSON, for plaintiffs in error.

Mr. EZRA T. ELLIOTT, Mr. GEORGE P. WILSON, for defendant in error.

Mr. Justice White delivered the opinion of the court:

CAIN, as plaintiff in the trial court, recovered judgment against Charles Carney and Bert Hutcheson, co-partners, and the Bank of Center, a corporation, and its stockholders. The judgment debtors, defendants below, are the plaintiffs in error here. The cause of action is for damages which Cain claims to have sustained, by reason of the defendant bank wrongfully turning over to Carney and Hutcheson a certain draft and notes held by it in escrow. The controversy grew out of the following facts: Carney and Hutcheson were engaged in the real estate business, and entered into a contract with Cain whereby they agreed to sell him a certain lease of state lands situate in Rio Grande County. Subsequently this contract was abrogated, and new contracts made. It is the latter transactions that constitute the basis of this suit. By the terms of a written contract Carney and Hutcheson agreed that if Cain would "make the payments and perform the covenants" set forth in the contract to be made and performed by him, they would "assign and set over" all their "right, title and interest in and to" a "state lease" covering certain described land. The contract required Cain to pay Carney and Hutcheson for the lease $3,000 in the following manner: "$1,000 cash in hand paid, the receipt whereof is hereby acknowledged, and

the balance, $775.00 on October 1st, 1911, $500.00 on October 1st, 1912, $725.00 on October 1st, 1913, with interest at the rate of seven per centum per annum payable annually." The contract further provided that should Cain make default in his covenants and agreements, the contract might, at the option of Carney and Hutcheson, be forfeited, and the payments made on the contract be retained by them as liquidated damages. Cain in his pleadings alleged, and at the trial testified, that when this contract was presented for his signature, it was further agreed that Carney and Hutcheson should sign over the lease, and have such assignment approved by the State Land Board, and then placed in escrow with the defendant bank, and Cain was to deposit with the defendant bank the sum of $1,000 in cash, together with his four notes, payable at specified times to the order of Carney and Hutcheson, to be held in escrow by such bank, until such time as the lease so signed over and approved by the State Land Board had been deposited with it as aforesaid, and thereupon the cash and notes were to be delivered to Carney and Hutcheson. The escrow, upon the part of Mr. Cain, was completed as disclosed by certain correspondence between the Maryville National Bank of Maryville, Missouri, and defendant bank. June 23, 1910, the former wrote to the latter bank, at the request of Cain, as follows:

"* * * At request of Thomas Cain of this place, we hand you herewith the draft for $1,000. Mr. Cain is buying of Carney and Hutcheson an assignment of the lease they hold on northwest quarter Section 8, and southeast quarter Section 7, Township 40, Range 7, for $3,000.00, of which he pays $1,000.00 in cash and gives his note for the balance, divided into three notes of equal amounts, due respectively October 1st, 1911, 1912 and 1913, bearing seven per cent interest.

Mr. Cain says these notes are to be sent him here for execution, and if they are properly drawn as per understanding, as soon as he receives them he will sign them and send to you. Upon receipt of these notes by you, you

are then authorized to pay over to said Carney and Hutcheson the $1,000 herewith remitted, and deliver to them the said notes, upon delivery to you of the leases embracing the above described land, properly assigned to Mr. Cain and approved by the proper state officials, so that his rights under the lease will be unquestionable in every way.

The lease or leases, as Mr. Cain understands it, run for three years yet. If there are any complications whatever in the leases, or any question whatever about Mr. Cain's right to hold under the leases for the remainder of the term of about three years, you will not pay over the money or deliver the notes to said Carney and Hutcheson.

"It is further understood you are to hold the lease or leases in escrow until the notes given by Mr. Cain are paid. * * *

The original contract between Mr. Cain and Carney and Hutcheson in this matter was a little differently arranged, and in connection therewith Mr. Cain gave his three notes, which you hold and which are to be surrendered to him, and you will therefore kindly return them to us to be delivered to him. Such notes are to be cancelled in lieu of these new notes."

To this letter the defendant bank replied as follows:

"* * * We beg to acknowledge receipt of your letter of the 23rd, enclosing draft for $1,000.00, payable to order of Carney and Hutcheson of this place, to be delivered to them only on condition of assignment of land contract between them and one Thomas Cain. We are enclosing three notes executed by Mr. Cain, which are to be held until receipt by us of three substituted notes to be executed by Mr. Cain. When sent to us you may deliver these to Mr. Cain.

The leases to be assigned to Mr. Cain are now, and have been for some time, with the State Land Board at Denver. We are expecting these to be returned to us every day, but it sometimes takes a month to get papers back from there. However, we will examine same upon their return and see that they are properly executed so that there will be no

question as to the rights being vested in Mr. Cain to hold possession."

June 29th the defendant bank transmitted to the Maryville Bank the notes of Cain, properly cancelled, to which reference is made in the letter of June 23d, above set forth; and on July 3d the latter bank sent defendant bank the new notes of Cain in lieu thereof, and also the signed contract involved herein. The contract was sent, however, without the knowledge or consent of Cain.

In the lease deposited by Carney and Hutcheson with the defendant bank, Stella McCoy was named as the lessee, and her name appeared thereon as having assigned the same in blank. The assignment of the lease was never approved by the State Land Board. About four months before the maturity of any of the notes, Cain learned that the State Land Board had not approved the alleged assignment of the lease, and was told by such board that such approval was essential to a valid assignment. Cain thereupon called upon the defendant bank, inspected the lease and told the bank that he would not accept the same without such approval, and when the bank insisted that approval by the State Land Board was unnecessary, declined to go further in the matter, and demanded that it return to him the $1,000 draft and his notes. The bank had previously turned over to Carney and Hutcheson the $1,000 draft and Cain's notes; and when the first note matured, delivered the lease and the contract to Carney and Hutcheson upon their demand therefor.

The court found in favor of the plaintiff, thus establishing the existence of the supplemental agreement testified to by Cain, and embodied in the letter of the Maryville Bank to the defendant bank, transmitting the draft for $1,000. There is nothing inconsistent in the two contracts and they may both stand, though one was, and the other was not, reduced to writing and signed by the parties. The signed contract makes no reference to the giving of notes by Cain covering the deferred payments, and the only agreement therein relating to an escrow is found in the following

language: "It is agreed by both parties that the lease papers shall be put in escrow in the Bank of Center until all payments are made."

Defendants contend that the rights of all parties must be determined by the signed contract received by the defendant bank from the Bank of Maryville with the letter of July 3d, and that as there is no express provision in this contract that the transfer of the lease be approved by the State Land Board, none was required. We think it very doubtful, as a matter of law, whether a person would have discharged his obligation to "assign and set over" his "right, title and interest in and to" a state lease of lands without securing the approval of the transaction by such board. It is quite probable that such approval is a condition precedent to the right to transfer. Be that as it may, we are satisfied, under the finding of the court, that the signed contract was supplemented by the verbal contract; and that the rights of the parties relative to the escrow are dependent upon the terms of the letter transmitting the draft and the notes to the defendant bank. Having voluntarily become a bailee, the bank was bound by the terms of the bailment. Carney and Hutcheson sought possession of the escrow money and notes under a false claim, disregarded the escrow agreement, co-operated with the bank in its wrong, and are equally liable in the premises. The judgment is therefore affirmed.

Judgment affirmed.

Decision *en banc*.

No. 9082.

SMITH v. THE PEOPLE.

1. HUSBAND AND WIFE—*Common Law Marriage—Evidence.* Prosecution for non support under Laws of 1911 c. 179. The prosecutrix and accused had cohabited as man and wife for more than six years. At the beginning of this relation the accused was already married to another woman. Four years later this lady secured a divorce. During all their cohabitation the accused invariably addressed the prosecutrix as his

wife and introduced her as such to all whom he met; and they were regarded by all their acquaintances as husband and wife. *Held*, a common law marriage.

2. —— *Express Agreement not Necessary.* An agreement, in words, to be or become husband and wife is not necessary to a common law marriage. The agreement may be inferred from cohabitation and report.

3. CRIMINAL LAW—*Error—Record—Effect.* The record reciting an arraignment and plea is received in the court of review as importing absolute verity.

4. JUVENILE COURT—*Jurisdiction* The Juvenile Court is a court of record, and, under sec. 4 of c. 179 of the Acts of 1911, has jurisdiction of an information for the non-support of the wife of the accused.

Error to Denver Juvenile Court, Hon. Ben B. Lindsey, Judge.

Mr. RICE W. MEANS, Mr. PAUL DELANEY, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. CHARLES ROACH, Miss CLARA RUTH MOZZOR, Mr. BERTRAM B. BESHOAR, assistant attorney general, for people.

Opinion by Mr. Justice Allen:

THE plaintiff in error, hereinafter called the defendant, was convicted under the non-support act (Chapter 179, Session Laws, 1911), for his desertion of and willful failure to provide reasonable support for his wife.

The main contention of the defendant is that the evidence fails to establish that there ever had been a marriage between the defendant and the prosecuting witness, the latter being named in the information as the defendant's wife.

The testimony discloses the following facts, which are not disputed. The prosecuting witness was orphaned at the age of nine years. She then made her home with her sister at Colorado Springs. When she was between fifteen and sixteen years of age she met the defendant. About one year after the defendant and the prosecuting witness became acquainted with each other they began to cohabit, and live together as husband and wife, and continued to do so for

a period of about six and one-half years, residing in the city and county of Denver during the last two and a half years of this period. For a short time these parties lived with the defendant's mother, and during the rest of the time they kept themselves separate and apart from others. At different times they were visited by their acquaintances, and by the defendant's relatives. During all of the time that they lived together it was the defendant's custom to introduce the prosecuting witness to those whom they met, and to their neighbors, as his wife.

At the beginning of their cohabitation the defendant was a married man, having another wife then living. This fact was by him kept secret from the prosecuting witness. She did not become aware of the defendant's prior marriage until some time between one and two years after she began to live with him, when she received a letter from his former wife.

On the 27th of March, 1914, which was more than two years before the defendant and the complaining witness ceased to live and cohabit together, the defendant's former wife was granted a divorce from him.

It appears to be taken for granted, in the argument on both sides, that after the defendant was divorced from his former wife, there was no longer any obstacle to a valid marriage between the defendant and the prosecuting witness. There having been no ceremonial marriage, the sole question in this connection is whether or not a common law marriage was entered into by the parties, after the defendant was divorced from his former wife.

After the granting of the divorce, as well as before, the defendant and the complaining witness were generally reputed to be, and regarded as, husband and wife. It does not appear from the testimony that at any time they were considered otherwise than as husband and wife, by any person who knew that they were living together. Before the granting of the divorce above mentioned, the parties in question lived in light housekeeping rooms, hotels and rooming houses. After such divorce, however, they made

their home in a cottage all to themselves for a time. Here they entertained friends, who recognized and treated the prosecuting witness as the defendant's wife. After the divorce from his former wife, the defendant continued his custom of introducing the complaining witness to people whom they met as his wife. The defendant spoke of her as his wife, and the defendant's sister referred to the prosecuting witness as her "brother's wife."

The parties in question lived and cohabited together continuously for over two years after defendant's former wife obtained her divorce, and until a short time before this proceeding was instituted. It appears that the cohabitation terminated by reason of the defendant's leaving the prosecuting witness, on which occasion he stated, in effect, that he would not "be back," and that he "got another woman." The record also discloses that during the period of their cohabitation the parties regarded and mutually acknowledged each other as husband and wife. Letters to the prosecuting witness from the defendant himself, and letters from other persons, were referred to in the testimony as having been so addressed as to show that the respective writers regarded this witness as a married woman, and the wife of the defendant.

The facts and circumstances hereinbefore narrated constituted evidence of marriage. The proof of marriage by cohabitation and repute has been recognized in many cases in the United States. *White v. White,* 82 Calif. 427, 18 R. C. L. 429. The defendant insists, however, that the evidence is insufficient to show that the parties ever *agreed* to be husband and wife. Mutual consent is one of the essentials of a valid marriage at common law. There is no direct evidence in this case that the parties agreed *in words to* become husband and wife, but mutual consent may be inferred from cohabitation and repute, of which there is ample evidence in this case. *White v. White, supra.* Furthermore, the agreement need not have been in words. In Bishop on Marriage, Divorce and Separation, Sec. 320, the author says that "not even words are in all circumstances

necessary. Or it is sufficient that the parties in language mutually understood, or in any way declaratory of intention, accept each other as husband and wife." In 18 R. C. L. 429, Sec. 57, citing among other cases, *Klipfel v. Klepfel*, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96, and note, it is said:

"Cohabitation as husband and wife is a manifestation of the parties having consented to contract such relations inter se. It is holding forth to the world by the manner of daily life, by conduct, demeanor, and habits, that the man and woman have agreed to take each other in marriage and to stand in the mutual relation of husband and wife."

There was ample evidence to warrant the jury in finding that a valid common law marriage existed between the defendant and the prosecuting witness.

The defendant also contends that there was no proof of desertion and non-support. There was, however, uncontradicted testimony which tended to prove the charge, and under instructions in which no error has been pointed out or complained of, the jury found it sufficient.

The defendant in his brief contends that "the trial was a nullity because the charge against the plaintiff in error is a felony, and he was not arraigned and was not required to plead."

The record recites that on May 31, 1916, the defendant "is arraigned and pleads not guilty to the charges contained in the information filed against him herein." In 4 C. J. 512 it is said: "The record filed for the purpose of appeal imports absolute verity. It is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court." No application for a correction of the record was made in the trial court. On June 26, 1916, the defendant filed a motion for a new trial, one of the grounds for which was, "that the defendant has never plead to the information." This motion was supported by affidavit of the de-

fendant wherein he denied that he was arraigned and pleaded. An error in the record cannot be attacked collaterally. As was said in *Willson v. Broder*, 24 Calif. 190, "if the entry was erroneous, the error should have been brought seasonable to the notice of the court, on a direct motion to correct it." For the reasons above stated, the record which recites that the defendant was arraigned and pleaded will be taken as conclusive and to import absolute verity.

The plaintiff in error challenges the jurisdiction of the juvenile court in cases of this kind. A similar contention was overruled in *Martin v. People*, No. 9015, 168 Pac. 1171. The juvenile court is a court of record. Sec. 1591, R. S. 1908; sec. 1720 Mills Ann. Sts. 1912; *State Home v. Mulertz*, 60 Colo. 468, 154 Pac. 742. Section 4 of the statute under which the defendant in this case was prosecuted provides that "all courts of record shall have jurisdiction under this act." Session Laws 1911, p. 529; sec. 3454 Mills Ann. Sts. 1912.

The judgment is affirmed.

Affirmed.

Decision *en banc*.

No. 8718.

HALLIWILL v. WEIBLE ET AL.

1. DEED—*Execution—Blank as to Grantee*, parol authority to fill is sufficient. Such authority may be inferred from the conduct of the party, justifying the inference.

   One who delivers to another a conveyance of land, blank as to the grantee, but with authority to fill this blank, is estopped to deny the instrument where the agent has acted in conformity with the authority.

2. —— *Delivery*. A deed becomes effective only upon delivery. Delivery may be made by an agent, and the agent authorized thereto may insert the name of the grantee.

3. SEALS—*Abolished*. A writing under seal is no more than a simple contract (Rev. Stat. sec. 682).

Error to Prowers District Court, Hon. A. Watson McHendris, Judge.

Mr. W. A. MERRILL, Mr. ALLYN COLE, for plaintiff in error.

Messrs. HILLIARD, LILLIARD & FINNICUM, Mr. J. K. DOUGHTY, for defendants in error.

Mr. Justice White delivered the opinion of the court.

THE cause of action is the partition of certain real estate in the Town of Granada. It was brought by plaintiff in error against Charles H. Weible, who disclaimed any interest in the premises, and thereupon, by proper pleadings, Wilson became the real defendant in the case; and, upon trial, judgment was entered in his favor. Wilson claimed to be the owner in fee, and entitled to possession of the premises, under and by virtue of a certain warranty deed, made, executed and delivered to him for a valuable consideration by the plaintiff and Charles H. Weible, who was then her husband, on or about the 10th day of November, 1913. Plaintiff denied that the instrument was her deed; admitted that on or about the date designated she signed and acknowledged a deed purporting to convey the premises, but alleged that no grantee was named therein, and that there was no consideration therefor. She further alleged that her husband had "represented to her that if she would sign and acknowledge a deed in blank, he could and would sell the property for enough to enable him to pay her One Thousand Dollars for her interest in the premises," and that she had received no compensation whatever for her interest therein, and had never authorized the insertion of the name of defendant Wilson as the grantee in said deed. The pleadings on the part of Wilson set forth the deed in *haec verba*, prayed that the title to the premises be quieted in him, and for possession thereof; and alleged that in consideration of the delivery of the deed conveying to him the premises, subject to an incumbrance of $7.00, which he assumed and agreed to pay, he, under

the direction of the plaintiff's husband, executed and acknowledged a deed to certain lands owned by him in Las Animas county, and gave such instrument of conveyance to plaintiff's husband upon receipt of the aforesaid instrument of conveyance of the premises in controversy, and that plaintiff should not be permitted, in good conscience and equity, to deny that she had executed and delivered the deed under which he claimed the premises.

The undisputed facts are that plaintiff, until a few days before the institution of this suit, was the wife of defendant Charles H. Weible; that on November 10, 1913, and for some time prior thereto, each owned an undivided one-half interest in the premises in question. Plaintiff considered the property subject to the mortgage indebtedness thereon, worth $2,000., and desired to sell her interest therein for $1,000. Her husband was negotiating for its purchase, and wrote her that he could make the deal, through trading the premises for two houses in Denver; and that if she would sign a deed without designating a grantee therein, and send the same to him in Denver, he would close such trade, borrow $1,000 on the property he received in exchange, and send the same to her, in payment of her one-half interest in the premises. Plaintiff thereupon signed and acknowledged a warranty deed, in which there was no grantee named, purporting to convey her interest in the premises, and transmitted the same to her husband as requested. Plaintiff testified that her husband did not tell her the name of the person who owned the property for which he intended to trade; that she intended that the person to whom he delivered the deed should get the property therein described, and did not question that her husband would give her the money, and did not care in particular what trade was made, if she got her money. Wilson was eighty-three years old, had been a farmer all his life, and the transaction between him and plaintiff's husband was carried on through a real estate agent by the name of Waterman who brought the deed to Wilson with the name "John Wilson" therein written as grantee; and upon Wil-

son calling attention to the fact that his name was "John A. Wilson," Waterman inserted the initial "A." Shortly after the transaction, Waterman, in his office, introduced the plaintiff to Wilson, when the former said to the latter: "You are the new owner of the hotel," (the property in controversy here), to which Wilson replied that he was. It was some sixty days thereafter that plaintiff first complained of lack of authority in her husband to consummate the transaction.

Upon this state of facts the question arises: Is the instrument under which Wilson claims title the valid deed of plaintiff? In many, if not in most of the early decisions, and in some of the later, the courts have adopted the strict view and held that blanks in a deed of conveyance may not be filled, except by authority under seal, yet the more modern view in the United States "and that now supported by the weight of authority, at least of modern authority, is that parol authority is sufficient to authorize the filling of blanks left in sealed instruments." I. R. C. L., § 41, pp. 1009, 1010. In fact, in those jurisdictions that have by statute abolished seals, which is the case in this state, §682 R. S. 1908, it seems that the decisions are harmonious in holding that where a party executes a deed, bond or other instrument with a blank to be filled, like grantee, obligee, or payee to make it complete, he may by parol authorize another to fill the same, and when so perfected and delivered to the grantee, it is a valid instrument. Authority under seal being no longer necessary to give validity to such instruments, they are on the same footing as simple contracts, and the same rule should be applied to all. *Montgomery v. Dresher*, 90 Neb. 633, 134 N. W. 251, 38 L. R. A. (N. S.) 423. Such also is the substantial effect of *Palacios v. Brasher*, 18 Colo. 593, 596, 597, 34 Pac. 251, 36 Am. St. 305.

It is true that authority to make a deed must be given by deed; nevertheless, the insertion of the name of the grantee in a blank left in such instrument does not properly fall within the inhibition of that rule. Such insertion

merely completes the writing of the instrument and does not change its legal effect. The principle is stated as follows: "The rule that the signing, sealing and delivery of a blank which is to be filled as a deed can give no authority to make the paper a deed, was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. The whole act of execution is finally consummated by delivery, and if the grantor should think proper to reverse the usual order in the manner of executing the instrument, but in the end perfect it by delivery, it is a good deed." 2 C. J., § 128, p. 1248. As a deed becomes effective only upon delivery, and an agent may perform that function, a deed, executed with blanks for the insertion of the name of the grantee, given to an agent and subsequently filled and delivered by the agent of the grantor, is valid.

Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; 2 C. J., § 129, p. 1248, § 133, p. 1249; *Cribben v. Deal,* 21 Ore. 211, 27 Pac. 1046, 28 Am. St. 746; *Friend v. Yahr,* 126 Wis. 291, 298, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 710 Am. St. 924; *Lafferty v. Lafferty,* 42 W. Va. 783, 787, 789, 26 S. E. 262.

In *South Berwick v. Huntress,* 53 Me. 89, 96, 87 Amer. Dec. 535, it is said: "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond." Moreover, the authority to fill such blanks may be conferred orally, or it may be implied from facts which fairly justify the inference.

Hall v. Kary, 133 Iowa 465, 468, 110 N. W. 930, 119 Am. St. 639; *Swartz v. Ballou,* 47 Iowa 188, 29 Am. Rep. 470; *Forster v. Moore,* 156 N. Y. 666, 50 N. E. 1117, affirming the decision in 79 Hun. 472.

It has been held that where a party executes a deed having a blank instead of the name of the grantee, and delivers the same to another in such imperfect state, he intends thereby to confer on such other authority to complete the instrument and make it effective by delivery to the grantee whose name is inserted.

Friend v. Yahr, supra; So. Berwick v. Huntress, supra.

So it has been declared that where a note and mortgage fully executed, except a blank in each for the name of the payee and mortgagee, were delivered to an agent, who was to procure from whomsoever he could a loan of money thereon for the maker, it shows an intent that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery. *Van Etta v. Evenson,* 28 Wis. 33, 9 Am. Rep. 486. In *Swartz v. Ballou, supra,* where the owner of land executed a deed without designating a grantee therein, and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument effective as a conveyance. So the facts here warrant the conclusion that plaintiff intended that there should be inserted in her deed as grantee the name of any person with whom her husband might consummate a trade or sale of the property in question. Furthermore, in the instant case the deed came to the defendant Wilson for a valuable consideration, with his full name written therein as the grantee. It had been signed, acknowledged and sent out by the plaintiff with the intent that it should convey title to the person whose name was inserted therein as grantee by or through the authority of her husband. There is ample evidence to warrant the conclusion that Wilson's name, including the initial "A," was so inserted; and the plaintiff is, therefore, estopped from denying the validity of the deed. When a grantor signs and seals a deed, leaving unfilled blanks of the character of those here involved, and gives it to an agent with

authority to fill the same and deliver the instrument; and the agent fills the blanks and delivers the deed to the grantee, the maker is estopped to deny that the instrument, as delivered, is his deed. *Phelps v. Sullivan,* 140 Mass 36, 2 N. E. 121, 54 Am. Rep. 442. If plaintiff was deceived by her husband to her financial injury, it would be unjust and inequitable to relieve her by placing the burden upon defendant Wilson. *Wyman v. Bank,* 5 Colo. 30, 36, 40 Am. Rep. 133. We find no substantial error in the proceedings and the judgment is, therefore affirmed.

Decision *en banc.*

Mr. Justice Scott not participating.

No. 8721.

PAINESVILLE NATIONAL BANK *v.* HANNAN ET AL.

1. BILL OF LADING—*Rights of Assignee.* The delivery of a bill of lading is a symbolic delivery of the goods. As between a bona fide assignee of a bill of lading, and a creditor who seeks to stop the goods in transit, the equity of the assignee prevails.
2. APPEAL AND ERROR—*Matter not Pleaded,* will not be noticed.
3. DAMAGES—*Expenses of Litigation.* Action for unlawful sale of the goods of plaintiff. Expenses of prosecution of the action are not recoverable.
4. ——. *Exemplary Damages,* denied.

Error to Denver District Court, Hon. H. P. Burke, Judge.

Messrs. DANNA & BLOUNT, Mr. RICHARD A. SMITH, for plaintiff in error.

Mr. GRANT L. HUDSON, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS suit is to recover damages on account of the sale by Nisbet, as sheriff, of an automobile and equipment pursuant to a levy of a writ of attachment issued in a suit wherein Hannan, the other defendant herein, was plaintiff, against The Vulcan Manufacturing Company, of Ohio. At the conclusion of testimony of plaintiff, defendants moved a non-suit. The motion was allowed and the cause dis-

missed. Plaintiff brings the proceedings here for review on error. In the opinion the parties will be designated as in the trial court.

The essential facts are that Hannan, a dealer in automobiles in Denver, was a creditor of The Vulcan Manufacturing Company of Plainesville, Ohio, in the sum of $250.00, and while that company was so indebted to him he placed an order with it for the machine which he later seized under attachment. Prior to the receipt of his order that company had shipped the car in dispute to Chicago, consigned to the plaintiff bank, subject to the order of an automobile company of that city. A draft, payable to the bank, was attached to the bill of lading, but the Chicago firm neither paid the draft, nor accepted the car. Upon receipt of the order from defendant Hannan the car was re-consigned to the plaintiff bank, at Denver, subject to the order of Hannan with draft against him, payable to the order of the bank. When the automobile reached Denver Hannan attached it, as the property of the Vulcan Company, in a suit wherein he was plaintiff, and that company defendant. It was later sold by defendant Nisbet, as sheriff, despite the protest and claim of plaintiff, aserted from the time of the attachment levy, upon a judgment obtained in the attachment suit.

There is nothing in the record before us to overcome the proofs that the bank received the bill of lading either as security for money advanced to the Vulcan company, or in an outright purchase of the automobile. The only question is whether the bank may be regarded as the owner of the property covered by the bill of lading, at the time it was seized under attachment. The method followed by the Vulcan company and the bank, is of common use in transactions of this character. The status of parties who advance money upon bills of lading as security, or for the purchase of the property, has been frequently before the courts. In *Schmidt v. Bank,* 10 Col. App. 261, 60 Pac. 733, in speaking of the rights of the holders of bills of lading as col-

lateral, as against a creditor who attempts to stop the goods *in transitu,* the court at page 262 said:

"It is therefore true that as between a *bona fide* transferee for value of a bill of lading, and a creditor who seeks to stop the goods in transit the equity of the transferee must prevail."

One of the authorities cited in that opinion is *Beans v. Bank of Randall,* 146 U. S. 620, 36 L. Ed. 1107, 13 Sup. Ct. 186. In that case the bank advanced money to buy cattle, which were shipped to defendants. The bill of lading was given to the bank as security. Defendants sold the cattle and applied the proceeds upon an old account between themselves and the shippers of the cattle. In discussing the rights of the bank under such circumstances it was said at page 627:

"When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder. * * * A bank which makes advances on a bill of lading has a lien to the extent of the advances, on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt."

That the delivery of a bill of lading is a symbolic delivery of the goods was affirmed in *Merchants Exchange Bank v. M'Graw,* 76 Federal 930 (22 C. C. A. 622), where, at page 933, numerous authorities are cited in support of the following:

"There are numerous authorities which, in substance, declare that the delivery, by the owner of the goods, of a common carrier's receipt for them, as security for an advance of money with the intention to transfer the property in the goods, is a symbolic delivery of them, and vests in the person making the advance a special property in the goods, sufficient to enable him to maintain replevin or

trover, or other action at law, against another who attaches them upon a writ against the general owner."

In *First National Bank v. Mt. Pleasant Milling Co.*, 103 Iowa 518, 72 N. W. 689, the bank claimed an interest in two cars of wheat by virtue of a bill of lading. Defendant claimed the wheat under a writ of attachment. The court held:

"Bills of lading represent property, and when indorsed or assigned, operate as a symbolic delivery to the indorsee or assignee of the property covered threby. * * * The question here presented is not whether the indorsee takes the bill of lading free from all equities or defenses in the hands of the original holder, but whether he has a better title to the grain than an attaching creditor of the indorser. If A. should purchase a horse from B. and secures the delivery thereof upon a promise to pay for the same at some future time, he certainly has a better title than C. who attaches the horse as the property of B. after the delivery to A. So when the plaintiff in this case cashed the draft, and took the assignment of the bill of lading from the Commission Company, it secured a better title than the Milling Company, which attached the grain while in transit; and the fact that, when the grain was attached, it had not been called upon to make any direct advances to the Commission Company, is not in itself, of controlling importance. * * * If the bank had simply undertaken the collection of the purchase price as agent of the Commission Company, then the title to the grain remained in the latter company, and it was subject to attachment until delivered to and paid for by the Roller Company. But if the bank purchased the draft, and accepted the bills of lading as collateral security, or if it purchased the grain outright, and accepted the bills of lading as evidence of this purchase, or if, in consideration of the indorsement and delivery of the bills of lading, it made or agreed to make certain definite future advances, it acquired a title to the grain which could not be defeated by a subsequent attachment."

When a bank in good faith makes advances, whether as a purchaser or lender, and receives a bill of lading as security, it has a claim upon the property covered by the bill of lading, which is good as against the claim of a creditor of the shipper. No authorities have been, or can be, cited which controvert this proposition.

Defendants, however, rely upon section 2668, R. S., 1908, of the Statute of Frauds of this State, and insist that under it the sale of the automobile to the bank was void, for the reason that it was not followed by an immediate delivery, and an actual and continuous change of possession. Defendants did not plead the statute in the lower court, and even if properly pleaded it would have been a good defense, a question we do not decide, it cannot be invoked for the first time in this court on review. *Benjamin v. Matler*, 3 Col. App. 234, 32 Pac. 837; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039; *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927; *Hunt v. Hayt*, 10 Colo. 281, 15 Pac. 410. Upon the question of the Statute of Frauds as a defense in cases of this character, see *Cary v. Williams*, 47 Colo. 256, 107 Pac. 219, 135 Am. St. 219.

Neither the pleadings nor the facts warranted the introduction of testimony as to the expenses plaintiff incurred in the prosecution of this suit. Such expense is not a proper element of damage under the facts of this case. The action is not one in which exemplary damages are recoverable.

The judgment of the lower court is reversed and the cause remanded, with leave to the parties to amend their pleadings if so advised and for further proceedings in conformity with the views herein expressed.

Decision *en banc*.

Mr. Justice Scott not participating.

No. 8750.

DENVER & RIO GRANDE RAILROAD COMPANY EMPLOYEE'S RELIEF ASSOCIATION *v.* RISHMILLER ET AL.

CHARITABLE ASSOCIATION—*Charter Construed.* Defendant was an association of the officers and employees of a railway company, incorporated under Gen. Laws 1877, sec. 224. The purpose, as stated in the articles of association, was, by the collection of monthly dues from the members, to create a fund for the relief of the diseases and injuries of its members, to equip and maintain hospitals, employ physicians and surgeons, and purchase medical and hospital supplies. In the year of its organization, the association constructed and has ever since maintained a hospital, and two surgeons were placed in charge thereof, at slender and insufficient salaries which have never been increased; and in order to induce competent surgeons to accept these positions, the directors permitted them to admit patients, not members of the association, paying the association the regular and customary hospital charge, and paying the surgeon such fee as the two might agree upon. No non-member patient was ever admitted to the detriment of the member patients, and none of the funds of the association were applied to the treatment or maintenance of the non-member patients. *Held*, that the admission of the non-member patients was, by implication, within the general scope of the purposes of the association, and as there was no express restriction, the practice was not *ultra vires*.

Error to Chaffee District Court, Hon. Charles A. Wilkin, Judge.

Mr. E. N. CLARK, Mr. R. J. LUCAS and Mr. T. M. STUART, JR., for plaintiffs in error.

Mr. G. K. HARTENSTEIN and Mr. H. L. MCGINNIS, for defendants in error.

Mr. Justice Garrigues delivered the opinion of the court.

ALL the officers and regular employes of the D. & R. G. Railroad Company constitute the members of an association or corporation, not for pecuniary profit, called The Denver & Rio Grande Railroad Company Employes' Relief Association, which was defendant below, and is plaintiff in error here. The association was established in 1888 under

section 224, p. 155, Gen. Laws, 1877. The certificate filed in the office of the Secretary of State, states the purposes of the association are to collect monthly dues from the members, for the creation of a fund to be used for the employment of every proper and desirable agency in the treatment of all such injuries and disease of the members, as it may see fit to undertake; to build, lease or rent, furnish and equip hospitals; employ physicians and surgeons, and nurses, and to purchase medical and hospital supplies.

The constitution and by-laws provide that the general object of the association is to create a fund for the purpose of furnishing medical and surgical treatment to its members, under certain provisions and restrictions. The membership is involuntary, and includes all officers and regular employes of the railroad company. All contributing employes of the company are entitled to the benefit of the relief fund, members who work less than one-half a month, paying 25 cents, and those who work one-half or more, contributing 50 cents a month, which is deducted from their payroll, and turned over to the treasurer of the association. This fund must be devoted exclusively to the payment of legitimate expenses, and the furnishing of relief to sick and disabled employes. The treasurer of the railroad company is ex officio treasurer of the association, and disburses its funds under direction of a board of trustees consisting of eleven members, six of whom are chosen by the employes, and five are appointed by the general manager of the company. These trustees have general supervision over the affairs of the association, and are required to make such rules and regulations respecting the treatment of patients in the hospitals, as they deem proper in furthering the objects of the association. All hospital, and medical and surgical treatment are under the control and direction of the medical department of the D. & R. G. Railroad Company, the chief surgeon of which is *ex officio* chief surgeon of the association, and as such has the management of its hospitals, and medical service, and appointing of the medical staff. The hospitals are required to be

open at all times for the reception of sick or injured employes, but to secure admission to the hospitals, and be entitled to the benefits of the relief fund, the applicant must be a contributing employe of the company. Any such employe, at his request, is entitled to be admitted to the hospital, where his board, care, and treatment, shall be free. The division surgeons have charge of the hospitals established in their respective divisions, and it is their duty to see that no patient remains in the hospital after he is in a condition to be discharged.

In 1888, the association constructed a hospital at Salida, in Chaffee county, which it has since maintained and operated. Two division surgeons were appointed to take charge of this hospital, one, the head surgeon, to receive a salary of $150.00, and the other $125.00 per month. These amounts have never been increased, because the funds of the association did not justify the payment of larger salaries. To induce competent surgeons to accept the positions, the chief surgeon and the board of trustees permitted them to take or admit non-member patients who paid to the association the regular or usual hospital charges, the operating surgeon being permitted to charge and collect from the patient a fee for the operation or treatment, the amount of which was a matter of agreement between the patient and doctor. No physician or surgeon is permitted to have patients or to operate at the hospital, except members of the hospital staff, and no non-member patient is admitted, to the detriment of any member patient. This system has been followed since 1888 to the present time.

This suit was brought in equity by defendants in error to enjoin plaintiffs in error from receiving or treating, medically or surgically, in the hospital at Salida, persons who are not members of the association. The court found with defendants below upon all disputed questions of fact, but entered judgment for plaintiffs' basing its decision entirely upon the certificate of incorporation filed with the Secretary of State, and holding as a matter of law that the reception of non-members into the hospital for medical or

surgical treatment was *ultra vires,* that is, was unlawful, and in violation of the charter powers of the association as evidenced by the certificate.

1. But one question will be considered: Is the admission and treatment of non-member patients at the association hospital at Salida, *ultra vires?*

No doubt the ultimate object of the association is to treat and care for injured members. There is nothing, however, in the certificate, constitution or bylaws, which provides that the hospital shall be for the exclusive use of the members of the association, or prohibiting the admission of non-members. The evidence shows that since its organization in 1888, the association has paid the members of the medical and surgical staff at the Salida hospital, very small salaries, and that the surgeons have accepted the positions under an agreement and understanding with the association authorities, that they should be permitted to take into the hospital, non-member patients, and collect from such patients medical and surgical fees for their services. No part of the association funds are expended upon such patients; they have been admitted only when there was ample room in the hospital for receiving and treating them, and no member patient has been neglected or inconvenienced by reason of their admission and treatment.

The receiving of such non-members as patients, was not carrying on or transacting a separate and distinct business from that for which the association was formed, and was not forbidden by the certificates, constitution or bylaws. We do not propose to enter into a lengthy discussion concerning the implied powers of such an association. We think under the circumstances of this case, that the treatment of non-members in the manner pursued, comes within the general scope of the purposes of the association, by implication, and there is no express restriction against it. The lower court erred in holding the act to *ultra vires.*

Union M. Co. v. Rocky Mt. Bank, 2 Colo. 248-256; 10 Cyc., pp. 1096-1097, 1155; 1 Cook on Corporations (7 Ed.),

Par. 3; *Gas & Fuel Co. v. Dairy Co.*, 60 O. St. 96, 53 N. E. 711.

The judgment is reversed and the cause remanded with directions to dismiss the action.

Reversed and remanded.

Decision *en banc.*

Mr. Justice Scott not participating.

No. 8795.

DENVER & RIO GRANDE RAILROAD CO. *v.* WRIGHT.

1. RAILWAYS—*Fencing Act Construed.* Under sec. 10 of chapter 135 of the Laws of 1911 the owner of an animal killed upon the tracks of a railway is not required to file a claim with the station agent, until nor unless the railway company has complied with the provisions of secs. 5-9, which are conditions precedent, imposed upon the railway company.

   And in such case the six months' limitation contained in section 11 does not avail the company.

2. EVIDENCE—*Presumptions.* In an action for the value of live stock killed upon the uninclosed tracks of a railway, at a point where inclosure is required, it will be presumed, nothing appearing to the contrary, that the animals came upon the track at the point where they were killed.

3. APPEALS AND ERROR—*Harmless Error.* The improper admission of a memorandum book containing only this same matter testified of by the keeper of the book, is harmless.

Error to Chaffee District Court, Hon. Charles A. Wilkin, Judge.

Mr. E. N. CLARK, Mr. R. G. LUCAS, Mr. T. M. STUART, JR., for plaintiff in error.

Mr. H. L. MCGINNIS, Mr. G. K. HARTENSTEIN, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

1. This suit is brought under sections 1, 2, 3 and 4 of the railroad fencing act, S. L. 1911, p. 400, to recover the value of stock killed on the railroad. The basis of the action is negligence on account of failing to fence the rail-

road, and no recovery can be had which is not founded upon such negligence.

Section 1, requires every railway company to fence its railroad, and to construct and maintain good and sufficient cattle guards at public crossings, for the protection of livestock, amply sufficient to prevent it from getting on the railroad, except within the limits of incorporated towns and cities, or the yard limits of established stations, or at public road and highway crossings.

Section 2 makes every railway company failing to en close its railroad with such fences and guards, absolutely liable for all livestock running at large, killed on the railroad by the engines or cars of the company.

Section 3 provides if the railroad is enclosed with good and sufficient fences, and guards capable of keeping animals off the railroad, the company may plead and prove the same as a defense for any animals killed within the enclosure.

Section 4 makes the killing of any animal by coming in contact with any engines or cars, *prima facie* evidence of negligence, and the company liable for the full value of any animal so killed, unless it shall affirmatively show that the killing was not caused by its negligence.

Plaintiff alleges that the animals were killed by the engines and cars, upon an unfenced portion of the railroad at a point where the road was required to be fenced, and that the killing was due to, and resulted from a failure of the company to enclose its railroad at the point where the animals were killed.

The evidence shows that the animals were killed by coming in contact with a train on the railroad, at a point where the same was not enclosed, and where the law required an enclosure. The road was unfenced and there was no enclosure where the animals were killed. This established proof of absolute liability, until the company showed that the road was enclosed as required by law or that the killing was at a point where no enclosure was required. The company offered no pleading or proof to establish

either, or that the killing was not caused by its negligence. It denied the allegations of the complaint, and pleaded two affirmative defenses: One, The six months statute of limitations based on sections 10 and 11 of the act; and the other that plaintiff had not complied with secions 8 and 9 by declining to accept the estimated value of the animals or to arbitrate. These affirmative defenses are laid upon the following sections of the act:

Section 5, provides that the engineer killing an animal on the railroad shall notify the company, and that it shall notify the section foreman, and the nearest livestock inspector, and they shall go to the point where the animal was killed, and inspect it, and determine the ownership. The stock inspector must also estimate the probable value of the animal.

Section 6 makes it the duty of the inspector immediately to send a full report of his inspection to the Secretary of the State Board of Inspection Commissioners, showing all the facts, and his estimated value of the animal and the foreman is required to send a similar report to the claim agent.

Section 7 provides that the secretary, upon the receipt of such report from the inspector, shall notify the owner of the facts, and of the inspector's estimated value of the animal, and shall also send a copy of the inspector's report to the company.

Section 8 requires the owner within 30 days after he has received the report from the secretary, to make proof of ownership and deliver it to the secretary, who shall then notify the company and demand that it pay to the board the estimated value for the benefit of the owner, which, if accepted, shall constitute final settlement. But if the owner is dissatisfied with the estimated value, and is willing to arbitrate, he may file a claim with the board, in such sum as he thinks justly due him.

Section 9 provides that the parties may then arbitrate such claim before the board, and if they do, its finding shall be final.

Section 10 provides in the event the owner, after being

notified by the secretary, declines to accept the estimated value or to arbitrate as provided in sections 8 and 9, that he must, within six months from the date of the killing, file sworn proof and affidavit with the station agent, and if he fails to do so, the claim for damages is forever barred.

Section 11 provides if the company fails for 30 days after the owner has filed such demand, to pay the actual value of the animal, the owner may, within six months from the date of filing such sworn proof and affidavit of claim, sue and recover the actual market value of the animal, with legal interest thereon from the date the animal was killed.

2. There is no evidence that the railway company complied with the conditions precedent which required the owner to be notified by the secretary and given an opportunity to accept, arbitrate or decline as provided in sections 8 and 9. The provisions of sections 5, 6, 7, 8 and 9, are conditions to be complied with precedent to the owner being required to file a claim with the station agent as required in section 10. It is too plain to admit of discussion that it is only in the event the owner declines to accept or arbitrate, that he is required to file such claim. Plaintiff was given no opportunity to decline; therefore he was not required to file sworn proof and affidavit with the station agent.

The six months statute of limitations is unavailing to defendant, because it did not comply with the law relating to the killing of stock, setting sections 10 and 11 in operation and making them effective as to plaintiff. There is no pleading, proof or claim that the company complied with such conditions. Plaintiff's voluntary act in filing such claim with the station agent before bringing suit was unnecessary, merely gratuitous and fixed no limitation upon his right to sue and recover the full value under sections 1, 2, 3 and 4. We have held that a compliance with the act was a necessary condition precedent to putting sections 10 and 11 into operation.

C. R. I. & P. Ry. Co. v. Eyster, 63 Colo. 109, 111.

We cannot allow admissions of counsel to control as to the construction of an act of the legislature. The foundation of the suit is not a failure to pay a demand filed with the station agent. The action is based upon negligence for failure to fence the railroad at a point where it was required to be enclosed. The complaint pleads the ultimate facts constituting such negligence, which is clearly established by the evidence. Defendant makes no attempt by pleading or proof to overcome this liability by showing that the railroad was enclosed or that the stock got on the track at places where the company was not required to fence, or to exonerate the company in any way from negligence. At the points where the animals were killed, the road was required to be enclosed and in the absence of evidence to the contrary, it will be presumed these points were the points where they came upon the railroad.

33 Cyc., p. 1281 (c).

3. But if we concede, for the sake of the argument that the owner by filing his claim with the station agent waived the conditions precedent and voluntarily brought himself within the provisions of sections 10 and 11, defendant is in no better position because the suit was brought within six months from the date of filing such claim.

4. Defendant claims that portion of the statute allowing legal interest on the claim from the date the animal was killed, is unconstitutional. If that be conceded, which it is not, it makes no difference. The jury allowed plaintiff no interest.

5. The evidence showed that the section foreman found the dead animals along the side of the track, skinned them and burned the carcasses as required by law, and sent a report of his acts to the claim agent. Plaintiff procured an order from the court allowing him to inspect these records, and the company, under protest, produced them in open court on the trial, in response to such order. The deposition of the section foreman was taken by plaintiff and read in evidence, in which he testified both upon direct and cross examination, to finding the dead animals

along the track at places where the road was required to be fenced, and was unfenced; and that the marks and bruises upon them, hair upon the ties and marks in the snow and upon the banks and ground, showed that the animals had been killed by coming in contact with a train. The evidence was conclusive that the animals were killed by engines or cars, upon the unfenced portion of the railroad where it was required to be fenced. In connection with the section foreman's deposition read to the jury, plaintiff was allowed to introduce in evidence these reports made by him to the claim agent, and apparently some kind of a book kept by the section foreman, to the admission of which error is assigned. Plaintiff claims that these were properly admitted as a part of the *res gestae,* in which we do not concur.

Salas v. People, 51 Colo. 461-464, 118 Pac. 992, 37 L. R. A. (N. S.) 252.

The book was not preserved in the record or bill of exceptions, it is not before us and we have no way of knowing its contents. Conceding, but not deciding, that it was error to admit in evidence these section foreman reports, the error was harmless, because he testified orally upon direct and cross examination to all the matters contained in the written documents, and the evidence shows so conclusively that the animals were killed by coming in contact with trains on the unfenced portion of defendant's railroad, where the law required it to be fenced, and about which there is no controversy, that the error, if any, was harmless.

Judgment affirmed.

Affirmed.

Decision *en banc.*

Mr. Justice Scott not participating.

No. 8858.

POOR v. WILSON.

IRRIGATION DISTRICTS—*Taxes—Interest Coupons.* The landowner cannot discharge taxes levied to pay interest upon one issue of bonds, with coupons cut from a different issue.

Error to Otero District Court, Hon. J. E. Rizer, Judge.

Mr. H. E. POPHAM, Messrs. PERSHING, TITSWORTH & FRY, for plaintiff in error.

Mr. THOMAS K. SKINKER, Mr. CHARLES E. SABIN, for defendant in error.

Chief Justice Hill delivered the opinion of the court.

THE plaintiff in error, as the owner of land in The Otero Irrigation District, instituted this action in mandamus to compel the defendant Wilson, as county treasurer of Otero County, to accept in payment of the tax levied to pay interest on irrigation district bonds, included in the first half of taxes due in 1915, interest coupons clipped from certain bonds of the district; also, to accept a district warrant, and a certain amount of money in payment of the first half of the tax levied for maintenance of said district, payable in the year 1915. The judgment was for the defendant and the action dismissed.

The record discloses, that The Otero Irrigation District has outstanding five different issues of bonds, the first were issued in 1902, the second in 1906, the third in 1909, the fourth in February, 1910, and the fifth in September following; that the coupons tendered by plaintiff were clipped from the fifth issue of bonds, and were due June 1st, 1915; that the plaintiff was the owner of certain lands in the district; that his taxes payable thereon in 1915 were as follows: Interest on the five issues of district bonds, $243.71, principal due on bonds $113.02, for maintenance and operating expenses of the district $123.62, for state, county and school taxes $41.58; that on March 16, 1915, the plain-

tiff tendered to defendant, in payment of the first half of all of said taxes, eight interest coupons for $15.00 each, clipped from the fifth issue of bonds as aforesaid, a warrant of the district payable in 1915 out of the maintenance fund for $60.00 and $80.97 in cash. It is agreed that the coupons, warrant and moneys tendered are sufficient in amount to pay the first half of said taxes, if proper to be used at the time and for the purposes tendered.

The treasurer urges several reasons to justify his actions. It is unnecessary to consider more than one. The tender was as a whole. This action was to compel its acceptance as a whole. It is agreed that the levy for interest was made upon all of the lands in the district, and was in the amount required to pay all the interest, upon all the issues for the year 1915, with fifteen per cent added for delinquencies. When applied to this case, the ruling in *Thomas v. Patterson*, 61 Colo. 547, 159 Pac. 34, makes it the duty of the treasurer to apportion the moneys received for any tract of land in payment of this levy for interest, to the credit of the interest account of each of the five issues of bonds, in proportion that the amount of each bears to the whole. Somewhat similar conclusions pertaining to our Irrigation District Act were reached in *Eberhart v. Canon et al.*, 61 Colo. 340, 57 Pac. 189, and *Orchard Mesa Farm Co. v. Canon et al.*, 61 Colo. 347, 57 Pac. 192. It follows that the plaintiff cannot use coupons clipped from one issue of bonds to pay that portion of his taxes which are levied for the payment of interest upon other issues of bonds, for this reason the treasurer was justified in refusing the tender made.

The judgment is affirmed.

Affirmed.

Mr. Justice Bailey and Mr. Justice Allen concur.

No. 8903.

HOOD ET AL. v. BURLINGTON RESERVOIR, DITCH AND LAND COMPANY.

RESERVOIR COMPANY—*Duty and Liability.* Defendant was the owner of an irrigating ditch taking water from the Platte River, and conveying it to Barr Lake Reservoir. It was a mutual ditch. Sundry of its stockholders owned lands at a distance from the reservoir, and organized separate corporations, called respectively The Extension Company and Hudson Company, each of which constructed laterals from the reservoir to the lands of these stockholders. To be entitled to water, the consumer was required to hold stock both in the irrigating company, and one of the extension companies. Plaintiff was such stockholder, and sued for the value of crops lost by reason of the alleged negligence of defendant, in failing to supply water, according to its contract. The negligence relied upon was in the conservation and distribution.

It was held that when the defendant had delivered to the extension companies, respectively, their due proportion of the water in the reservoir, its duty was at an end.

The fact that defendant at times allowed an employee of an extension company to turn water from the reservoir, had not the effect to change the status in this respect.

2. CORPORATIONS—*Different—Identical Officers.* An irrigating company which supplies water from a reservoir to other and different corporations, who are charged with its delivery and distribution to the consumers, is not liable for the defaults of such distributing corporations, even though some of the offices in the two corporations are occupied by the same persons.

3. CONTRACT—*Construed.* Defendant maintained a reservoir from which it delivered water to other corporations, the owners of lateral ditches, extending to a distance from the reservoir.

Plaintiff was entitled to water from the reservoir, to be delivered through one of the laterals.

A contract of the defendant declared that the water was to be used by plaintiff upon designated lands. *Held,* in view of a long established practice to the contrary, that this could not be construed as importing that defendant should convey the water to these lands, but rather to limit the area of land to be irrigated with a specified volume, and prevent the consumer from delivering any portion of it to others for other lands.

Error to Adams District Court, Hon. H. S. Class, Judge.

Mr. W. C. HOOD, JR., for plaintiffs in error.

Messrs. SMITH, BROCK & FERGUSON, for defendant in error.

Chief Justice Hill delivered the opinion of the court.

THE plaintiffs in error, hereafter called the plaintiffs, instituted this action to recover damages to crops, caused from lack of water during the year 1910, which they allege the defendant had contracted to furnish them, and their assignors, through its ditch and reservoir system. A motion for non-suit was sustained and the action dismissed. This is the error complained of. The evidence discloses that the defendant is the owner of what is called The Burlington Ditch, which secures its water from the Platte river, near Denver, running thence in a northeasterly direction to near the town of Barr, where it owns a system of reservoirs called Barr Lake; that it is what is commonly known as a mutual ditch and reservoir company, and as such has proprieties for its ditch and reservoir; that a large number of its stockholders are supplied from its ditch before it gets to the reservoir, the remainder out of the reservoir; that only stockholders are entitled to water; that in order for them to get it, in addition to paying annual assessments on their stock, they must sign an application or contract for the amount of water they wish for, any year, and pay an additional amount therefor; that the defendant's properties terminate at the reservoir; that in order to have the water carried from the reservoir to the lands involved as well as other tracts, two carrying companies were incorporated known as The Extension and Hudson Companies, each of which constructed two laterals, or carrying canals, starting near the main dam of the reservoir (Barr Lake), thence running in northerly directions; that in order to derive any benefit from stock in these carrying companies its owners must likewise be stockholders in the defendant company. In other words, it

requires stock in both to give the privilege of carriage from the river to the lands north of the reservoir; that the practice has been for the defendant company to secure the water from the river, carry it through its ditch, store it in the reservoir, then turn it out into these Extension ditches when called for by the person in charge of them, to be by them carried to their respective stockholders entitled thereto, and in proportion to the amount that each is entitled from the defendant company.

The complaint, among other things, charges the defendant with negligence in not securing sufficient water in the reservoir during the winter of 1909 and 1910. It is agreed, however, that this allegation was not sustained by any proof, but to the contrary that the reservoir was reasonably supplied in the spring of 1910 and that the negligence proven, if any, was in the conservation and distribution of the water in and from the reservoir, during the irrigation season of the year last named. When sustaining the motion for non-suit and holding the defendant guiltless in these respects, the court said:

"The main question now, and it seems to me at all times has been, the wrongful distribution. * * * I think the Burlington Company, the defendant, is not charged with the distribution of the water after it is turned out of the headgate at Barr Lake. Counsel now has met that contention by relying upon the terms of the contract, which says that, in effect, the Burlington Ditch, Reservoir and Land Company had agreed to deliver the water to the lands of the plaintiffs. I was very much interested in that theory of construction of the contract, but I find that I am not in accord with his views in that regard. The testimony shows that the purpose of the Extension Company was to sarry the water and charge for the same; * * * So in this case if the water was wrongfully distributed, it was the wrongful act of the Extension Ditch Company and not of the Burlington Ditch, Reservoir and Land Company."

We are in accord with this conclusion. The record discloses that the Extension Companies were organized by

the consumers of water below the reservoir, for the purpose of receiving from the reservoir the waters to which the plaintiffs as stockholders of the defendant were entitled. The Extension Companies were the agents of the plaintiffs for this purpose, and when the defendant delivered the water to them for the plaintiffs, its duties concerning it ceased, the responsibility for its proper distribution rested upon the Extension Companies, of which plaintiffs were stockholders. The fact that some of the officers of the defendant were also officers of the Extension Company did not make any difference in this respect. The fact that the defendant at times allowed an employe of the Extension Company's to turn the water into the Extension Ditches from the reservoir did not change this status, as he was only doing what he would have had a right to call upon the defendant to do for him. According to the evidence, it was the duty of the defendant company to turn the water into the Extension Ditches when called for by those in charge of them, when this was done, as before stated, its responsibility ceased, the handling of it thereafter, including its distribution, was the act of the Extension Companies. The fact that the defendant company permitted these employes to do certain acts for it which were proper, viz., turn the water from the reservoir into the Extension Ditches, would not make it liable for its wrongful distribution by the same persons as employes of the Extension Companies.

The claim that the Extension Companies were the agents of the defendant company in delivering the water, is not sustained by any proof. 'Tis true, the contract says that the water is to be used for irrigation and domestic purposes upon certain land, describing it, but there is nothing in the contract which says that the defendant company shall deliver it to these lands. The evident object of the company in placing this limitation in the contract was to limit the amount of land that could be irrigated by any stockholder with a certain amount of water, also probably to prevent the consumer from selling, leasing or delivering

any portion of it to another for other lands. Whether this limitation is valid, need not be determined, but it is incapable of being construed into a contract of carriage to the lands of the consumer. As heretofore stated, the Extension Companies were expressly organized for this purpose. This fact, together with the practice followed, tends to disclose that the parties had never placed such a construction upon the contract.

The authorities cited which recognize certain principles pertaining to connecting lines of railroads where the initial carrier receives the commodity for transportation to a station upon another line has no application to a case of this kind.

The judgment is affirmed.

Affirmed.

Mr. Justice Garrigues and Mr. Justice Scott concur.

No. 8922.

ROTGE v. ROTGE.

1. DIVORCE AND ALIMONY—*Change of Conditions—Effect as to Alimony.* After the allowance of temporary alimony judgment was recovered in another court against both husband and wife, for medical services rendered to the wife in the meantime. The husband made no defense to the action. On the petition of the wife the husband was required to pay the amount of this judgment as well as the wife's hospital bill.
2. APPEAL AND ERROR—*Judgment.* Pending an action for divorce, the wife incurred a bill for medical services. On her petition the husband was ordered to pay the amount of the wife's liability, being a bill at a hospital, and a bill due a surgeon. It being objected that this required payment to those not parties to the suit, the court declined to reverse the judgment, but directed its modification, requiring payment of the proper amounts into court, to be used by the wife in discharging the indebtedness in question.

Error to El Paso District Court, Hon. W. S. MORRIS, judge.

Mr. M. M. BURNS, Mr. IRA HARRIS, Mr. EDWARD C. STIMSON, Mr. PAGE M. BRERETON, for plaintiff in error.

Mr. W. D. LOMBARD, Mr. JAMES A. ORR, for defendant in error.

Mr. Justice White delivered the opinion of the court.

THE question involved grows out of a divorce proceeding, wherein the defendant in error here was plaintiff, and the plaintiff in error was defendant. Upon application for temporary alimony, etc., the court entered an order requiring the defendant to pay plaintiff $125.00 per month, $100.00 as attorney fees, and the further sum of $25 as court costs, "until the further order of the court." Thereafter an answer was filed to the complaint for divorce. While the matter was thus pending, and approximately six months after the date of the filing of the answer, plaintiff filed a petition in the case wherein she recited the order aforesaid relating to temporary alimony, etc., and alleged "that at the time of the granting of said order it was understood by all parties to this cause, and so stated upon the hearing for such order, by the said judge of this court, that such sum was allowed with the understanding that it was not to cover or intended by the court to cover unforseen conditions or contingencies that might arise, whereby the plaintiff might undergo other expense necessary and required to be paid, prior to the trial of this cause and final determination thereof in this court." She further alleged that subsequent to such order, and prior to the filing of the instant petition, it became necessary for plaintiff to undergo an operation, "and for that purpose (she) was taken" to a hospital where she was operated; that the necessary expenses incurred in such operation were $28.90 for hospital fee and $160.00 fee of the surgeon, which she had incurred, was unable to pay, and now owed; that the aforesaid temporary alimony required by order of the court to be paid by defendant to plaintiff per month was and is "inadequate and insufficient with which to take care of the extra expense." The petition was sworn to and ended with a prayer that the court require the defendant to forthwith pay to plaintiff, or to the hospital and the surgeon, the aforesaid sums. No answer or affidavits denying the facts alleged in the petition were filed. Upon the hearing of the petition, it was conceded by counsel on

either side, that the surgeon who performed the operation had sued the parties to this suit before a justice of the peace, and recovered judgment against both for the amount of his fee, but nothing had been recovered upon the judgment, though plaintiff in error had been garnished as being indebted to defendant in error and had answered thereto, admitting his indebtedness for the monthly alimony due. The court thereupon found the issues upon the petition in favor of plaintiff, and that the expenses of the operation and hospital bill incurred were an unforeseen contingency, for which no provision had been made by the court and that the bills were just, and that judgment for the surgeon's bill had been rendered in the justice court against both the parties to this suit, and ordered that plaintiff in error herein pay the hospital bill and said judgment, and that the payment of said amounts should in no wise be deducted from or in any way affect the temporary alimony required by prior order of the court to be paid by defendant to plaintiff each month.

The ordinary rule that, wherein a divorce suit temporary alimony has been awarded the wife and the husband duly pays the same, he will not be liable thereafter for necessaries subsequently furnished her, has no application to the facts of this case. It may be that the husband, in the instant case, might have avoided the judgment against himself in the justice court by making the defense now suggested. This he did not do, and the finding is that a judgment was rendered therein against both the parties hereto and stands unpaid. While it is the debt of the husband, it is likewise the debt of the wife, and the substantial effect of the order is that the husband furnish her with money to pay her debt. If compliance with the order incidentally satisfies a judgment against the husband, it in no wise affects this controversy. The question here relates to the power of the District Court, where the divorce suit is pending, to increase the payments, required to be made by the husband during the pendency of the suit, to meet the needs of the wife which have arisen because of changed condi-

tions, and has nothing to do with the rights of third parties as against the husband. Defendant further contends that the order is invalid, for the reason that it requires him to make payments to persons not parties to the suit. It is true that it directs defendant to pay the hospital bill incurred by plaintiff, and the judgment in favor of the surgeon for his services. The purpose of the proceeding was to relieve plaintiff of the obligations in question, and, if it was technically an error, to order defendant to pay the same directly, instead of requiring him to pay the necessary amount into the court to be used by plaintiff in the discharge of such indebtedness, it may be corrected here and a reversal of the judgment is unnecessary. The judgment is accordingly so modified; and, as modified, affirmed.

Judgment affirmed.

Decision *en banc.*

Mr. Justice Scott not participating.

No. 8942.

FORKER *v.* HOPKINS ET AL.

WATER RIGHTS—*Adjudication Decree—Effect.* A decree adjudicating the priorities of the several ditches of a certain stream, and the volume to which each was entitled, *held* to control and overrule an express agreement of the parties to a contrary distribution, though reported and approved by the referee, and though the court approved and confirmed these findings in all respects; *held* that the officers in charge of the water service were bound by the decree.

Doubted if the evidence and referee's findings were admissible to vary or avoid the effect of the decree,—even as against third persons, having full notice.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. THOMAS A. RUCKER, Mr. J. W. DOLLISON, for plaintiff in error.

Mr. ED. T. TAYLOR, Mr. CHAS. W. TAYLOR, for defendants in error, Hopkins and Hopkins.

Mr. C. W. DARROW, for defendants in error, Schleischer and Schleischer.

Mr. Justice Garrigues delivered the opinion of the court.

TILLIE FORKER, owner of the Forker and Gibson ditch, brought this suit against defendants in error, owners of the Landis Ditches Nos. 1 and 2, the O. K. Ditch, and the Chapman ditch. From the complaint, to which a demurer was sustained, it appears that in 1888, there were five constructed ditches diverting water for irrigation from Landis Creek, a stream in Garfield county furnishing but a small quantity of water, to-wit: Landis Ditches Nos. 1 and 2, owned by Dollie Landis; O. K. Ditch, owned by C. A. Kendall; Forker and Gibson Ditch owned by William Forker and one Gibson, and the Chapman Ditcher owned by Frank Chapman. These are the only ditches on the stream, and they are alleged to have appropriated all the water. May 12, 1888, the owners of the several ditches entered into the following agreement in writing, by which Kendall was to have one-fifth of the water of the creek for the O. K. Ditch, and the other ditches the remainder:

"The undersigned, Wm. Forker, Frank Chapman, Mrs. Dollie Landis, Mrs. Tillie Gibson and C. A. Kendall, parties of the first part, and C. A. Kendall, party of the second part, all of Spring Valley, Garfield County, Colo, have this 12th day of May, A. D., 1888, agreed upon and made the following settlement of their conflicting water rights and priorities, in and by these presents make, acknowledge and confirm the following conveyances in the premises: The said parties of the first part relinquish and convey unto the party of the second part, his heirs and assigns, one-fifth of the entire waters running in the natural water course of what is known as Landis Creek—said one-fifth to be taken for agricultural or other purposes, but only to be taken by the party of the second part between the first day of April and the last day of September of each and every year—and none of said waters to be taken by party

of the second part at any other than the last mentioned time or period of time.

The party of the second part relinquishes and conveys unto the parties of the first part, their heirs and assigns four-fifths of the waters of said creek during the period last mentioned—and all the waters of said creek during the balance of any and every year—that is to say, between the first day of October of each year and the last day of March of the succeeding year—the said waters to be used for agricultural or other purposes.

Whereas, the several parties or their grantors or privies in estate have heretofore filed in the office of the Clerk of said county their several statements and plats of ditch or water claims, claiming the waters of said creek for the purposes aforesaid, now the intent and object of this conveyance and grant, is to convey to the several parties all interests acquired by virtue of the said several statements according to the proportions and for the purposes herein stated.

As a part of this contract it is hereby stipulated that a disinterested person shall act as water commissioner, whenever his services are required by either party, who shall superintend the making and maintaining the headgates that may be required by any one of the several parties, and shall control the flow of water therein with the view or for the purpose of carrying out the intent of this instrument. If the parties cannot agree upon the person who shall act as such commissioner, he shall be selected by arbitration, as provided by law or the agreement of the parties. This covenant shall run with the lands of the several parties hereto.

It is agreed that the said commissioner shall without a day's delay in order that the crops for the present year may be saved, proceed to put in the several headgates mentioned and perform the other duties herein prescribed."

After this and prior to October 9, 1889, William Forker sold to one Graham, and Frank Chapman sold to Fred

Chapman, and on this date Landis, Kendall, Graham, Gibson and Fred Chapman, as owners of the various ditches, each filed a separate petition in the District Court asking for a statutory adjudication settling the appropriation and priority of the respective ditches to the use of water for irrigation, none of which, however, made any reference to the agreement. The court referred the matter to a referee to take testimony, and submit draft of findings and a decree. The agreement hereinbefore mentioned was introduced in evidence and the claimants each testified before the referee that they were willing to abide by the agreement and desired that a decree be entered in accordance therewith. The findings of the referee among other things stated that by the written agreement of the claimants, the priorities of the ditches are equal, and in the distribution of the water, the water commissioner should divide the water of the creek to the ditches accordingly. The findings were approved and confirmed, in all respects, by the court, and filed in the clerk's office with the evidence. Notwithstanding the court adopted the findings, it signed a decree which was entered of record, giving to each ditch the appropriation and priority to which it was entitled under the rule of priority, irrespective of the contract, as follows:

"Ditch No. 32A, claimant Dollie Landis, name, Landis Ditch No. 1, priority No. 36A, dated June 1, 1882, amount 1.6 cubic feet per second.

Ditch No. 32 B, claimant Dollie Landis, name Landis Ditch No. 2, priority No. 36B, date June 1, 1882, amount 1.6 cubic feet per second.

Ditch No. 72 A, claimant Clark A. Kendall, name O. K. Ditch, priority No. 91A, date May 15, 1884, amount 1.2 cubic feet per second.

Ditch No. 85A, claimant Forker and Gibson, name Forker and Gibson Ditch, priority No. 117A, date April 30, 1885, amount 1.5 cubic feet per second.

Ditch No. 103, claimant Fred Chapman, name Chapman

Ditch, priority No. 143, date April 25, 1886, amount 2 cubic feet per second."

After the decree was entered, Tillie Forker became the sole owner of the Forker and Gibson Ditch, water rights and lands thereunder, and defendants in error acquired by purchase, the other ditches, water rights and lands thereunder. The complaint alleges that each and all of said defendants had at the time they acquired title to their lands and their ditches, and their right to the use of water from Landis Creek, complete notice and knowledge of the existence of said contract, and the terms and conditions thereof, and that their grantors had at all times acquiesced therein, and divided the waters of the creek in accordance with the terms of the contract; that in 1914 defendants violated the agreement and took all the waters of the stream in times of scarcity; but nowhere is it alleged that they violated the terms of the decree. The complaint prays for an injunction restraining defendants from interfering with plaintiff's use of the water of the creek as provided by the contract; that the contract be declared in full force, and binding upon the parties to the action; and for damages and costs.

1. The position of plaintiff seems to be that the validity of the contract, and not the validity of the decree is involved; that it was the duty of the court in the adjudication proceeding to enter a decree settling the appropriations of the ditches according to the priorities, just as was done, and leave the parties to adjust their rights among themselves under the prior agreement, and if they could not do so, that an action might be brought to enforce the agreement, notwithstanding the decree.

No doubt there is a conflict between the agreement, the findings and the decree, and the question in this suit is, which shall prevail. Which shall the water commissioner recognize in the distribution of the water to the ditches, the agreement and findings, or the decree? While it is true the adjudication conferred or created no new rights upon the parties, still, the decree is the final judgment

pronounced by the court, in the system of procedure enacted for the express purpose of determining and settling the appropriations and priorities of the various ditches on the stream, and it is *res judicata* as to the matters therein adjudicated and settled. It is doubtful whether the files in the clerk's office containing the evidence and findings of the referee could be admitted in evidence in this case for the purpose of impeaching, varying or avoiding the force and effect of the decree. If the decree entered is different from the decree pronounced, there is an appropriate way by which it may be made to speak the truth; in this proceeding we are bound by the decree as entered.

In *Bates v. Hall,* 44 Colo., at page 367, it is said:

"The general statutory decree was required to be entered in the judgment book of the court. As thus spread upon the records it is the best evidence of what was adjudicated in that proceeding. If it is different from the decree as reported by the referee, the presumption is the latter was modified by the court after the report was filed and before the entry was made. Upon the showing in this record, it is doubtful if 'Exhibit A.' was sufficiently identified to justify its admission as evidence at all. If, as claimed by respondents, it had been altered, the court should not have admitted it. If the decree as entered is different from the decree as actually pronounced, those making such contention should make the entry speak the truth. Until it is so corrected, it is binding on all the parties and prevails over the exhibit, even though the latter contains what the court decided."

Our constitution provides that the water of every natural stream within the state, is the property of the public, that is, of the People of the State, and it is dedicated to their use in that instrument. The State, through the legislature, has established a system of procedure by which the volume and priority of ditches on the streams may be judicially determined, and decrees entered accordingly. It also provides for the policing of the streams and the distribution of the water to the ditches entitled thereto, by statutory

officers appointed by the Governor for that purpose, who must distribute the water according to the decrees. Any private contract, the effect of which is to abrogate these laws, and deprive the water officials of their legal powers and duties to enforce the judicial water decrees, must of necessity be void. These irrigation decrees define the rights of the ditches to divert water from the streams, and become the law or distribution to be followed by the police officers in times of scarcity, when it is necessary to police the stream. In the case at bar, the decree is pleaded and an attempt made to avoid its enforcement by showing that its terms are not in accordance with the evidence, and the findings of the referee, which were adopted by the court. If it be true that the decree entered by the court is contrary to the evidence, and the findings of the referee confirmed and accepted by the court, the time to correct such error was then and there, and in the manner provided by law. Appropriate objections should have been made to the proposed decree, and if overruled, the complaining parties had their remedy by appeal to this court, where any alleged wrong, mistake or error, could have been reviewed. The decree was signed and entered in 1890 and has since been a matter of public record. Any interested party could ask, and the water officials would be bound to distribute the water in accordance with its terms, regardless of the contract or agreement entered into by the parties prior thereto, concerning the distribution of the water.

The judgment of the lower court is right and will be affirmed.

Affirmed.

Decision *en banc.*

Mr. Justice Scott not participating.

No. 8965.

DEROSE v. THE PEOPLE.

CRIMINAL LAW—*Forgery—False Statement in Writing which is Otherwise Genuine,* and what it purports to be, e. g., the insertion in a railway time roll of one who, during the time indicated, rendered less service than set down to his credit is not forgery.

Error to Lake District Court, Hon. Chas. Cavender, Judge.

Messrs. HOGAN & BONNER, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, Mr. RALPH E. C. KERWIN, Assistant Attorney General, for The People,

Mr. Justice Garrigues delivered the opinion of the court.

CHARLES DEROSE was convicted of forgery in the court below and sentenced to a term in the penitentiary.

The information charged that he feloniously and falsely made and forged a certain order, warrant and request for the payment of money by the Denver & Rio Grande Railroad Company, to-wit, a certain railway time roll, and did feloniously utter, publish, pass and attempt to pass as true and genuine, a certain false order, warrant and request for the payment of money by the Denver & Rio Grande Railroad Company, to-wit, a roadway time roll, with intent to damage and defraud the company.

On motion for a bill of particulars, the prosecution furnished defendant with a copy of the instrument alleged to have been forged and uttered, which is a time sheet or railroad time roll, containing the names of men who worked on the Tennessee Pass section; the time they worked and rate and amount of compensation due each for the month of December, 1915; which defendant, as section foreman, made and certified as correct, and sent in to the road master.

The evidence shows that defendant was section boss or foreman on the Tennessee Pass section; that a part of his duties was to make out and send in the time roll of the men who were working for him on the section, at the

end of the month; that he "padded" the time roll for the month of December, 1915, by crediting Albert De Rose with more days than he had worked during that month. The customary method of paying section men, was for the foreman to make out the time roll at the end of the month, certify it as correct and send it to the office of the road master, where it was checked over, countersigned and sent to the superintendent's office, as the basis of the pay roll. The time roll remains in the superintendent's office and the pay roll is made up from it, and sent to the treasurer's office in Denver, from which office the pay checks, when written, are sent to the men whose names appear on the roll. In this instance the fraud was discovered in the road master's office, before the pay roll was made up.

The court instructed the jury:

"3."

"Under the statutes of Colorado, the fabrication of any false instrument with intent to defraud, or the attempt to pass such instrument with like intent, is forgery, even though there is no forged endorsement by the payee. The crime does not consist in accomplishing the fraud, but in attempting it by prohibited means, and if you should find from the evidence that Charles De Rose placed the name of Albert DeRose upon the pay roll with intent to defraud the Denver & Rio Grande Railroad Company out of pay for any number of days, you will find him guilty of forgery."

The statute provides:

"Every person who shall falsely make, alter, forge or counterfeit * * * any order, or warrant or request for the payment of money * * * with intent to damage or defraud any person or persons, body politic or corporate * * *; or shall utter, publish, pass or attempt to pass as true and genuine, or cause to be uttered, published, passed or attempted to be passed as true and genuine, any of the above named false, altered, forged or counterfeited matters as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice,

damage or defraud any person or persons, body politic or corporate * * *; every person so offending, shall be deemed guilty of forgery."

1. This writing is what it purports to be: a true and genuine instrument, although it contains false statements. It is not a false paper, and the execution of such a document, does not constitute forgery. The prosecution failed to distinguish between falsely making an instrument, and making a false instrument, and this paper was not falsely made or forged. To forge or counterfeit an instrument is to falsely make it. The term "falsely make" as used in the statute, refers to the paper itself as being false, and not the truth or falsity of its statements. The statute refers to the false making or altering, and not to the tenor of the writing or the facts stated therein. A false statement of fact in an instrument, which is itself genuine, by which another person is deceived and defrauded, is not forgery.

State v. Young, 46 N. H. 266, 88 Am. Dec. 212; *Territory v. Gutierrez,* 13 N. M. 312, 84 Pac. 525, 5 L. R. A. (N. S.) 375; *U. S. v. Glasener,* 81 Fed. 566.

So in this case, defendant, when he made up and signed the time roll, did not make a false writing. The document itself is genuine, and the fact that he made a false statement in the writing, does not constitute the crime of forgery.

The judgment of the lower court is reversed.

Decision *en banc.*

Reversed.

Mr. Justice Scott not participating.

No. 8970.

RIO GRANDE JUNCTION RAILWAY COMPANY *v.* ORCHARD MESA IRRIGATION DISTRICT.

1. IRRIGATION DISTRICTS—*Warrants—Remedies of Holder.* The holder of a warrant of an irrigation district is not entitled to judgment for the amount thereof. His sole remedy is mandamus.

That the warrant is chargeable to "general fund for maintenance" is not important.

The duty of the district board and the county commissioners, under the statute, expounded.

2. PLEADINGS—*Demurrer—Several Counts—Effect.* Where of several counts one contains a statement, nowhere disputed in the others, which shows that in no event is the plaintiff entitled to his action, a demurrer to the whole complaint is properly sustained.

Error to Mesa District Court, Hon. Thomas J. Black, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. BENJAMIN GRIFFITH, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

THE plaintiff in error, hereafter called the plaintiff, elected to stand upon its second amended complaint after a demurrer had been sustained thereto. It contained three alleged causes of action growing out of the same transaction, and which entitled it, if at all, to but one judgment. The first count, in substance, alleges that the defendant is an irrigation district; that in November, 1909, it entered into a written contract with the plaintiff (ratified by its electors at an election held for that purpose, etc.), whereby the plaintiff agreed to raise its tracks on the north bank of Grande River, so as to protect them from damage by reason of water to be empounded in a dam which the district was then constructing; that the district agreed to pay plaintiff the cost of this work, and was to deposit with it $35,000.00 to be applied in such payment, if that amount was required; that if it cost more it would pay the additional amount, etc.; that the district deposited the $35,000.00; that the work was done as agreed; that its total cost was $43,733.77; that after crediting the $35,000.00, there was a balance due of $8,733.77; that plaintiff made out an itemized account of said balance due, verified, and filed it with the secretary of the defendant; that said claim was disallowed by the board of directors of said district,

and that there is due the plaintiff said sum with interest from the 25th of November, 1911; that defendant has at all times neglected and does now neglect to make the necessary levy, to pay or provide for the payment, of said sum, and that defendant does not intend to provide any funds to pay the balance due. Judgment is prayed for the amount alleged to be due with interest.

The second count alleges the same facts as the first up to the amount due it, then alleges, that the defendant disputed the balance due, and entered into negotiations for an adjustment of the sum to be paid, etc.; that in consequence of said negotiotions, and on or about November the 27th, 1911, the parties then and there agreed that the plaintiff would accept $8,104.85 in full settlement of all that was due under said contract: that the defendant promised to pay said amount, and by its board of directors did audit and allow said bill for the sum of $8,104.85, but that defendant has neglected and does neglect to make the necessary levy to pay or provide for the payment of said sum; that there is no money in the treasury of said districts, with which to pay any part of said sum, and that defendant does not intend to provide any funds to pay the balance due, etc. The prayer is for judgment for the amount last named, etc.

The third count is practically the same as the first and second up to and including the performance of the contract. It then alleges that plaintiff filed its claim in due form with the secretary; that thereafter and in November, 1911, the claim was duly audited and allowed by the board of directors of the defendant district in the sum of $8,104.85 and that on January 2, 1912, the board of directors ordered a warrant drawn for the payment of same; that on January 4th, following, the defendant issued and delivered to plaintiff its warrant therefor, the material portion of which reads:

"Pay to the Rio Grande Junction Railway Company or bearer, $8,104.85, * * *.

For services or material for maintenance, operation and current expense of said district.

Charge same to general fund for maintenance, etc."

That on January 5th, following, the plaintiff presented said warrant to the treasurer of the district for payment; that there were no funds to pay said warrant; that its payment was refused and it was registered as follows:

"Registered. Presented. No funds. Jan. 5, 1912.

This warrant draws interest from this date at 6 per cent. per annum. Benton Canon, Co. Treas."

that this warrant has never been paid and is still due; that under and by virtue of the laws pertaining to irrigation districts, the board of directors is required to make a levy upon the land included within said district at a certain rate per acre sufficient to pay off delinquent and outstanding warrants; that the board of directors of defendant has failed and neglected to make any such levy, for the purpose of paying this warrant and does now neglect and refuse to make any levy to pay said warrant or any part thereof; that there is now due the plaintiff thereon $8,104.85 with interest. The prayer is for judgment for this amount.

As the third alleged cause of action covers the entire transaction, it should be considered first. Were we disposed to be technical, we could affirm the court's ruling thereon by calling attention to the fact that the irrigation district act does not require or authorize the board of directors of a district to make a levy to pay outstanding warrants or any levy for any purpose. The power to make levies for the district is vested in the board of county commissioners, hence, the neglect or refusal of the district board to do something which it has no right to do, fails to state any neglect or duty on its part. We do not care, however, to dispose of this count in this manner. In order to consider it on the real point involved, we will assume that the allegation is sufficient to charge neglect upon the part of those whose duty it was to certify an amount sufficient to include this warrant, as well as a failure upon the part of those whose duty it was to make the levy therefor.

With these assumptions included, are the facts sufficient to allow the plaintiff, after accepting a warrant in payment of its debt, to thereafter secure a money judgment upon the warrant? When contested, it has never been permitted upon such a showing as to county, city or town warrants in this jurisdiction, but to the contrary when nothing more is presented than alleged in this count, mandamus is held to be the exclusive remedy.

Forbes v. Grand County, 23 Colo. 344, 47 Pac. 388; *Gunnison County v. Sims*, 31 Colo. 483, 74 Pac. 457; *City of Denver v. National Exchange Bank*, 34 Colo. 387, 82 Pac. 488; *City of Denver v. Bottom et al.*, 44 Colo. 308, 98 Pac. 13; *Berkey v. County Commissioners*, 48 Colo. 104, 110 Pac. 197, 20 Ann. Cas. 1109; *Beeney v. Irwin*, 6 Colo. App. 66, 39 Pac. 900; *Grand County v. The People*, 16 Colo. App. 215, 64 Pac. 675.

While the cases cited apply to warrants of counties, cities and towns, the reasons given for the rule make it applicable to warrants of irrigation districts. In *Forbes v. Grand County, supra*, this court, speaking through Mr. Justice Goddard points out the legislation pertaining to claims against a county, their allowance, payment in warrants, registration thereof, the levying and collection of taxes for their payment, the paying of same in the order of their registration, etc., followed with the conclusion that the holder has the right to a writ of mandamus to compel their payment out of the funds levied for that purpose, and in certain cases to compel a levy in order to create a fund out of which they can be paid. The irrigation district act contains somewhat similar provisions including a clause that the revenue laws of the state for the assessment, levying and collection of taxes on real estate for county purposes, except as modified in the act, shall be applicable. This act makes it the duty of a district board of directors on or before September the 1st of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners said amount, to-

gether with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. Upon the receipt of this certificate, the county commissioners are required to make a levy sufficient not only to raise the amount thus certified, but fifteen per cent additional to cover delinquency. It will thus be seen that a complete method is provided to take care of the current expenses of the district by making a levy sufficient therefore, and fifteen per cent additional; if this proves inadequate, the act provides that the board at its next annual meeting for this purpose shall include such additional amount as may be necessary to meet any deficiency, in the payment of said expenses theretofore incurred. To put it in the language of Chief Justice Campbell, in *Gunnison County v. Sims, supra,*

"This method of payment and enforcement of the same is exclusive, except, as in case of county warrants, when for some exceptional reason, such as a diversion of the fund, a different procedure may be resorted to."

In the case at bar no such exception is pleaded, but to the contrary, the neglect of duty presented in plaintiff's brief consists in the district board's failure to certify an amount sufficient to cover this warrant, and the county commissioner's failure to make the necessary levy therefor. There is no allegation in the complaint, except by inference, that the district board neglected its duty in this respect, but if either board has, the ruling in the cases above cited it is to the effect that plaintiff's remedy was by mandamus to compel them to perform it.

The contention that the warrant was upon the general fund of the district, and for that reason the cases cited are not applicable, is not well taken. The warrant is not upon funds not otherwise appropriated, but reads chargeable to general funds for maintenance, etc. In *Eberhart v. Canon,* as treasurer of this irrigation district, 61 Colo. 340, 157 Pac. 189, this court held that the moneys derived from the levy for one year for maintenance, operating and current expenses could not be used for other purposes, or for

the payment of the same kind of expenses for some other year, until all of those for the year for which it had been levied were paid. Also, that the levy made to meet the deficiency in the payment of expenses theretofore incurred could not be used for other purposes until the deficiency for which it was created had been paid. This ruling, in a sense, is to the effect that each of these funds is a special fund, to the extent at least that each must be used for the purpose for which it was created, until that purpose is accomplished, and that as to this general fund, so-called, it must be applied to the payment of the maintenance, operating and current expenses for the ensuing year, and none other, at least until such expenses for that year had been satisfied. An irrigation district is but a quasi-municipal corporation, created for a specific purpose. It is likewise only authorized to procure funds by taxation for certain purposes. The fund upon which this warrant was drawn was of that class and brings it within the rule recognized by our former cases.

By a supplemental brief, plaintiff urges a reversal under the rule that when tested by a demurrer each count or separate alleged cause of action in a complaint stands alone, as if it were a separate complaint, for this reason it urges that if the first or second count states a cause of action (although omitting to state all the facts as contained in the third count and by stating some that are in apparent conflict with it), that the demurrer should have been overruled as to them. We appreciate the force of this rule where applicable, but the cases cited do not cover a state of facts as presented here, which disclose that if the allegations in plaintiff's third count are true, it could not maintain this action on either of the three counts. The third count contains the allegation that it accepted and had registered a warrant for the debt sued on. This is not disputed in either the first or the second count. It is but a continuation of the history of the transaction between the parties, and by alleging it the plaintiff has plead itself out of court, but regardless of this, it now asks us to ignore

this allegation for the purpose of passing upon the demurrer to its first and second counts concerning the same transaction. Section 55, Revised Code 1908, says:

"The complaint shall contain * * * a statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition."

In *Cripple Creek M. Co. v. Brabant,* 37 Colo. 423, 425, 87 Pac. 794, it is said:

"As stated in *Spaulding v. Saltiel,* 18 Colo. 86, 88, the practice of pleading a double statement of the case so as to meet the exigencies of the proofs is not, as a general rule, permitted under the code. The rule, however, is not absolutely inflexible."

The foregoing states the practice in this jurisdiction. It is questionable if the facts disclosed justify the attempted effort to plead three causes of action, when all the facts could have been included in one simple statement, without unnecessary repetition, but in any event when the record is considered as a whole, it does not justify a reversal.

Section 84, Revised Code 1908, provides that:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The plaintiff having disclosed by its pleadings that in no event would it be entitled to maintain this action, it would be but a waste of time to pass upon its contentions concerning the correctness of the ruling in sustaining the demurrer to its first and second alleged causes of action.

The judgment is affirmed.

Affirmed.

Mr. Justice Bailey and Mr. Justice Allen concur.

No. 8972.

WESTERN INSURANCE COMPANY *v.* SKASS ET AL.

FIRE INSURANCE—*Explosion—Policy Construed.* A policy insuring the owner of certain premises against loss by fire contained a condition that the insurer shall not "be liable . . . (unless fire ensues and in that event for damage by fire only) by explosion of any kind". *Held* that where the fire causes the explosion it is to be regarded as a mere incident of the fire, and the insurer is liable for the results thereof.

Error to the Denver District Court, Hon. John A. Perry, Judge.

Mr. SYLVESTER G. WILLIAMS, for plaintiff in error.

Mr. PHILIP HORNBEIN, Mr. MILTON L. ANFENGER, for defendants in error.

Opinion by Mr. Justice Allen:

THIS is an action upon a fire insurance policy to recover indemnity for loss occasioned by fire upon premises insured by the plaintiff in error.

The plaintiffs below, the insured, alleged, and the evidence shows, that a fire occurred at the dwelling house described and protected by the policy; that after the fire had been in progress for some little time, an explosion occurred, causing a portion of the building to collapse; that the fire preceded and was the direct and proximate cause of the explosion, and of the injury to the building; and, that the explosion was an incident to the fire.

It is admitted that the total loss occasioned by both the fire and the explosion amounted to $661.43, and that the loss occasioned by the fire alone, when considered as if no explosion had occurred, amounted to $58.00.

The plaintiffs sued for and recovered a judgment for the loss occasioned by the fire itself and also for the loss caused by the explosion.

The main contention of the plaintiff in error, the insuring company, and the only contention discussed in its brief, is that by the terms of the policy the company is not liable

for the explosion damage in this case. The policy sued on was admitted in evidence, and it is therein provided and agreed that:

"The Western Insurance Company, in consideration of the stipulations herein named (etc.), does insure Rebecka Skass * * * against all direct loss or damage by fire, except as hereinafter provided, * * * to the following described property."

Under the heading, "Conditions Referred to in the Body of Contract," are various provisions, including the following:

"This company shall not be liable for loss caused directly or indirectly by invasion * * * or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind."

The explosion clause above quoted is the only basis for the contention of plaintiff in error, and the sole question for determination is whether such clause relieves the insurer from any liability for the loss resulting from the explosion, under the facts and circumstances disclosed by the evidence in the case at bar.

In the case of *German-American Insurance Co. v. Hyman,* 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77, this court having before it a fire insurance policy containing an explosion clause in the same language as is the clause in question in the instant case, used the following language in determining the liability of the insurer:

"If the fire preceded the explosion, and the explosion was an incident thereto, the fire was the direct or proximate cause of the injury by the explosion, and plaintiff was entitled to recover for his entire loss."

The plaintiff in error contends that the language above quoted is *obiter dictum,* and that therefore the *Hyman* case is not decisive of the instant case, under the doctrine of *stare decisis.* We do not concede that the point thus raised is well taken, but even if the language quoted should be regarded as *obiter dictum,* the result, nevertheless, would be the same. The rule stated in the opinion in the *Hyman*

case is in accord with most, if not all, of the decisions of various courts that have determined the liability of an insurer under a fire insurance policy containing this usual explosion clause, where, as in the case at bar, a hostile fire preceded and caused the explosion and the explosion was an incident to such fire. Supporting the view taken in the Hyman case, to the effect that in such cases the insured is entitled to recover his entire loss, are the following authorities: *Transatlantic Fire Ins. Co. v. Dorsey,* 56 Md. 70, 40 Am. Rep. 403; *Washburn v. Miami Valley Ins. Co.,* 2 Flipp. 664, 2 Fed. 633; *Hall v. National Fire Ins. Co.,* 115 Tenn. 513, 92 S. W. 402, 112 Am. St. Rep. 870, 5 Ann. Cas. 777, and note; *Wheeler v. Phenix Ins. Co.,* 203 N. Y. 283, 96 N. E. 452, Ann. Cas. 1913 A-1297, and note, 38 L. R. A. (N. S.) 474, and note; *Mitchell v. Potomac Ins. Co.,* 183 U. S. 42, 46 L. Ed. 74, 22 Sup. Ct. Rep. 22; *Fire Assn. of Philadelphia v. Evansville Brewing Assn.,* (Fla.) 75 So. 197.

In *Transatlantic Fire Ins. Co. v. Dorsey,* supra, it is said:

"In this case the exception of liability for explosions of any kind is certainly very broad and comprehensive; but that exception must not be so construed as to defeat the main and principal object of the insurance. * * * But where a fire has occurred, and is in progress, the effects of which are covered by the policy, and an explosion takes place as an incident or result thereof—so as to increase the loss—whether the whole of the damage or loss thus produced can be regarded as within the protection of the insurance, in a case where the policy contains the exemption from liability for explosions, has been the subject of some diversity of judicial opinion. We think, however, both upon reason and the established rules of construction, that such loss should be regarded as within the risk assumed by the insurers. In such case the fire is the direct and efficient cause of the loss, and the explosion but the incident, and if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms."

In 14 R. C. L. 1218, sec. 398, the text referring to clauses

in fire insurance policies exempting the insurer from liability in case of explosion, it is said:

"Under a provision of the latter character, if the fire precedes the explosion and the explosion is an incident thereto, the fire is the direct or proximate cause of the injury by the explosion, and the insured is entitled to recover for his entire loss."

In view of the authorities above cited, we are of the opinion that the rule announced in the *Hyman* case correctly states the law applicable in the instant case, and that under the facts disclosed by the evidence in this case, the plaintiffs below are entitled to recover, under the terms of the policy sued on, the total loss occasioned by both the fire and the explosion. For the reasons above given, and adopting the rule announced in the Hyman case, the judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8992.

BUNNELL v. HOLMES ET AL.

1. JUDGMENT—*Vacating—Discretion.* The granting or denying of a motion to vacate a judgment and allow an answer, under sec. 81 of the Code, is discretionary with the Trial Court. In the absence of an abuse of discretion its action is conclusive upon the Court of Review.
2. —— *Evidence—Burden of Proof.* The burden is upon the defendant to show everything which may move the court in his favor, in the exercise of a sound discretion. That defendant had had actual notice of the pendency of the action long before the entry of the default, tends strongly to justify denial of the motion. Knowledge of an attorney employed by defendant is imputed to the defendant himself; and the court is under no duty to relieve him of the consequences of his attorney's mistakes.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Mr. M. M. BULKELEY, Messrs. MAHIN & MAHIN, for plaintiff in error.

Mr. JOHN F. MAIL, for defendants in error.

Opinion by Mr. Justice Allen:

ON March 5, 1915, Holmes and McGinnis, plaintiffs below, commenced an action against Bunnell, defendant below, to quiet title to certain real estate. Bunnell was a non-resident, and service was had upon him by publication. The last publication of summons was upon May 27, 1915.

The default of the defendant was entered on October 16, 1915, which was over three months after it could have been entered. On the same day a hearing was had, and judgment given for plaintiffs.

On November 1, 1915, the defendant filed a motion to set aside the default judgment. On April 27, 1916, upon a hearing at which both parties appeared, the motion was overruled. Defendant brings the case here for review.

The granting or denying of a motion to set aside a judgment and to allow answer to the merits under section 81, Revised Code 1908, relied on by defendant, is discretionary with the trial court. *Fullen v. Wunderlich,* 54 Colo. 349, 351, 130 Pac. 1007. The trial court's conclusion on such motion, in the absence of an abuse of discretion, is conclusive upon this court. *Wallace v. Heitler,* 52 Colo. 620, 622, 123 Pac. 954.

The question presented upon this review is whether the trial court abused its discretion in refusing to vacate the default judgment, upon the showing made by the affidavits attached to the defendant's motion and the testimony taken at the last mentioned hearing.

The burden was on the defendant to show everything that would entitle him to a vacation of the judgment in the exercise of sound discretion by the court. *Fullen v. Wunderlich,* supra. The defendant states in his affidavit that he had no knowledge or notice of the pendency of this action until October 20, 1915. The plaintiffs, on the other hand, introduced evidence tending to show that the defendant had actual notice of the pendency of this action for more than three months prior to the time his default

was entered. The question whether the defendant had actual knowledge of the pendency of the action in time to have appeared and answered before default was entered was one of fact to be determined by the court upon the evidence. *Parker v. Maslin,* 85 Kan. 130, 116 Pac. 227. If the trial court was warranted in finding that the defendant did have such notice, it would be a circumstance strongly tending to justify the court in denying a motion to vacate the judgment. As said in the Fullen case, *supra,* "the defendant could have known all about the suit and might be attempting to take advantage of his being a non-resident in order to delay its ultimate termination." See also *Smith v. Collis,* 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912, A-1158.

The defendant in his affidavit states that about the 1st of June, 1915, he employed Mahin & Mahin, attorneys, to ascertain whether there was any suit affecting the title to the land involved in this action. The evidence discloses that F. W. Mahin, of the firm of Mahin & Mahin, came to Wray, Yuma County, about June 30, 1915, and while there asked for and examined the files in this case in the office of the clerk of the District Court. Mahin must have known at that time that the suit was pending, and he gained this knowledge in the course of the particular transaction in which he was employed by the defendant. Under these circumstances, the knowledge of the attorney is imputed to the client, in this case the defendant. 6 C. J. 638, sec. 144.

The clerk of the court testified that the order of publication and affidavit set forth the postoffice address of the defendant as Smith Center, Kansas. It is admitted that this address is correct. The clerk testified that he sent a copy of the summons, and a copy of the complaint, by mail to the defendant at Smith Center, Kansas; that he made an affidavit to that effect; and that he personally remembers that he did so mail the copy of summons and complaint; also, that it was mailed in an envelope bearing his official return card, and that it never came back. The clerk

further testified that he received a letter from the defendant's attorneys on May 8, 1915, and in answer thereto sent them a copy of the complaint in this case. These are additional facts tending to show that both the defendant and his attorneys had actual notice of the pendency of the action. The testimony of the clerk is not contradicted. The clerk's affidavit, to which he refers in his testimony, is in the record, and recites that he mailed a copy of the summons to the defendant at Smith Center, Kansas, on April 28, 1915. The defendant did not allege in his affidavit that he did not receive a copy of the summons or copy of the complaint mailed to him.

The defendant attempted to meet the foregoing facts by showing that Mahin by mistake informed him that no suit was pending, and that the mistake was due to Mahin's confusing the instant case with another case that had also been pending. The trial court was not bound to relieve the defendant from the consequences of negligence, if any there was in this connection, on the part of his attorneys. 15 R. C. L. 711, sec. 161. Mahin, on behalf of the defendant, also testified that he had never received any response to a letter that his firm wrote to the clerk of the court in May, 1915. This is not very material, since Mahin came to the clerk's office within two months thereafter. Mahin also testified that he wrote to the clerk on July 29, 1915, asking if any suit had been filed, and that no reply was received. The clerk, however, testified that he has no recollection of having received the letter. As said in *Wallace v. Heitler*, supra, "all the facts were before the trial court, and it is not the province of a review court to overturn the findings of a trial court upon such matters, unless it clearly appears that an arbitrary and unjustifiable discretion has been exercised."

Upon a full consideration of all the facts that were in evidence before the trial court, we can not justly find that the court abused its discretion in overruling the motion. We are of opinion that no sufficient reason is shown why

the judgment should be set aside, and it is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9294.

PASSINI v. THE INDUSTRIAL COMMISSION OF COLORADO ET AL.

1. INDUSTRIAL COMMISSION—*Review of by Supreme Court*, extends only to the questions of law (Laws 1915, c. 179, sec. 83). The Court considers only the legal question whether there is evidence to support the finding; not whether the Commission misconstrued its probative effect.
2. —— *Rehearing—Proceedings upon Construed.* One claiming compensation for an injury, under the statute, was heard twice by the Commission, and variant orders were made. At a later hearing, entirely new issues were presented. Testimony relating to a new malady, alleged to have recently developed as a result of the accident, was heard. The proceedings were in effect a new trial upon all the issues, and the findings were adverse to the claimant. It was held that the District Court was without jurisdiction to review the action of the Commission, until the claimant had first petitioned for a rehearing, as required by secs. 69, 77, of the act.

Error to Denver District Court, Hon. John I. Mullins, Judge.

Mr. GEORGE ALLAN SMITH, for plaintiff in error.

Mr. HENRY A. DUBBS, Mr. HENRY C. VIDAL, for the American Smelting & Refining Company.

Hon. LESLIE E. HUBBARD, attorney general; Mr. JOHN L. SCHWEIGERT, assistant attorney general, for the Industrial Commission, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court:

THIS case is here on writ of error to review a judgment of the District Court sustaining a demurrer to the complaint in an appeal from the findings of The State Industrial Commission.

The claimant was injured in May, 1916, by falling from a platform. From the time of the injury until the hearing before the Commission he had received compensation from,

and had been cared for and received medical attention through, the defendant, The American Smelting & Refining Company, in whose employment he was when injured. On December 8th, 1916, he was awarded compensation to January 5th, 1917, by the Commission. At that time his injuries were found to consist of a bruised shoulder, and traumatic neurosis, which latter was held to be the proximate result of the accident. On February 16th, 1917, the case was reopened by the Commission, for the purpose of determining the extent of other alleged disabilities. The defendant company denied further liability, but expressed willingness to provide additional treatment. It was thereupon ordered by the Commission that if claimant would subject himself to medical and hospital treatment, he should be awarded compensation from and after January 5th, 1917. But should he fail and refuse to avail himself of the proposed treatment, that the original order, denying compensation after such date, should stand.

On April 7th, 1917, he filed a petition for rehearing, which was denied. On May 19th he filed another petition for rehearing, which was granted, and on June 11th, after what was, to all intents and purposes, a primary or original trial, the Commission set aside the February award, and affirmed the award of December 8th. Without applying for a new trial, he brought action in the District Court, where his complaint was dismissed on demurrer, and the findings and award of the Commission sustained.

In considering questions arising out of the sufficiency of the evidence which supports the award, it must be borne in mind that the court is expressly bound by statute. Section 83, chapter 179, Laws 1915, is as follows:

"The Commission, or any party who may consider himself aggrieved by a judgment entered upon a review of any such finding, order or award, may have questions of law only reviewed by the Supreme Court."

This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative

effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom. *Papinaw v. Grand Trunk Ry. Co.*, 189 Mich. 441, 155 N. W. 545; *Redfield v. Michigan Ins. Co.*, 183 Mich. 633, 150 N. W. 362; *William Rahr Co. v. Industrial Com.*, (Wis.) 163 N. W. 646; *In re Von Ette*, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916 D. 641; *Oniji v. Studebaker Corp.*, 196 Mich. 397, 163 N. W. 23; Hernold on Workmen's Compensation, sec. 242.

So far as the merits of the case are concerned, there is nothing in the record upon which the findings of the Commission may be properly set aside. It appears, however, that the District Court sustained the demurrer to the complaint on the ground that claimant failed to follow the statute in perfecting his appeal. The first finding and award, that of December 8th, 1916, provided for compensation to January 5th, 1917, and by it the Commission in effect found that claimant was disabled and that he probably would remain so until that date. It is urged that the Commission had no power thus arbitrarily to fix the date of the recovery of the claimant, but we are not called upon to pass upon this question, for the reason that the case was reopened, presumably for the very purpose of ascertaining whether there was a change in claimant's condition. After the hearing of February 16th, it was ordered that claimant receive hospital treatment tendered by the defendant company, and "if not accepted by the claimant, shall be in full discharge of all liability of the respondent." On June 11th a new finding and award was made and entered, setting aside the February award and affirming that of December 8th.

At the hearing upon which the award of June 11th is based, entirely new issues, as well as the old ones, were before the Commission, and full consideration was given to both. That hearing can in no sense be considered a mere review of former findings. More testimony was then taken than at any previous hearing, some of which related to an

entirely new malady, alleged to have recently developed as a result of the accident, and the proceedings were, as stated above, practically a new trial. Upon all of the issues, new and old, the findings were adverse to the claimant. The District Court was therefore without jurisdiction to review the actions of the Commission, until the claimant had first petitioned it for a rehearing, as provided by section 69 of the Act. Failure to petition for a rehearing brings the claimant within section 77, which provides:

"No action * * * to set aside a finding, order or award of the Commission * * * shall be brought unless the plaintiff shall have first applied to the Commission for a rehearing thereof, as provided by this Act."

The purpose of the Act is to confine the settlement of compensation cases to the Commission itself, so far as is consistent with justice. It is clear that the legislative intent was that the Commission should be given an opportunity to review its own findings, before permitting claimants, or other dissatisfied persons, to resort to the courts.

In the case at bar the claimant failed to avail himself of his right to petition for a rehearing before he appealed to the District Court, and for this reason the appeal was incompetent and futile. The judgment of the District Court must therefore be affirmed.

Judgment affirmed.

Decision *en banc*.

Mr. Justice Scott not participating.

No. 8494.

HEBER ET AL. *v.* PORTLAND GOLD MINING COMPANY ET AL.

INJUNCTION—*To Restrain Crime.* Courts of equity are not equipped for the administration of criminal law, and attempts to extend the jurisdiction to that field, should receive no favor.

Where the direct and immediate effect is to protect property, an injunction may go, even though incidentally it enjoins the perpetration of a crime; otherwise where such result is indirect and inferential only.

Bill to restrain defendants from buying ores known to be stolen. It was contended for plaintiff that enjoining the purchase, would indirectly restrain the theft. The lax administration of the criminal law, and the difficulty proving the theft of the minute quantities often stolen, was also urged.

Considering that if the theft of one class of property may be enjoined, the owners of other properties liable to similar depredations would be entitled to the same relief; that the awarding of the equitable relief prayed for must be attended by the same difficulties as the prosecution of the theft, and would in effect be a denial of the right of trial by jury, to one accused of crime, the injunction was denied.

Error to Teller District Court, Hon. W. S. Morris, Judge. En banc.

Mr. E. G. VANATTA, for plaintiffs in error.

Mr. E. J. BOUGHTON, Mr. N. WALTER DIXON, Mr. THOMAS J. DIXON, for defendants in error.

Opinion by Mr. Justice Teller:

THE defendants in error brought suit against the plaintiffs in error, and several others who do not appear here, for injunctive relief.

The complaint alleged that the plaintiffs were the owners and operators of mining and milling property in the Cripple Creek Mining District; that in said district there were many other persons and corporations owning and mining their properties in the same general way as were the plaintiffs; that in the said operations the plaintiffs and the mine operators have expended many million dollars; that the said mining properties contain gold bearing ores, some of which are what is commonly known as "high grade" ores, of great value; that said high-grade ores may be distinguished by their physical appearance; that since the beginning of mining in said district they have been subject to theft by employes of plaintiffs and the other mine owners, to the amount of millions of dollars; that large numbers of men are employed in said mines; that such thefts of ore are profitable only because of the existence of a class of assayers whose principal business is dealing in such stolen

ores; that the defendants belong to said class of "high-grade assayers," and are engaged solely in buying ores which they know to have been stolen; that they encourage said employes to steal said ores, and aid and assist one another in said unlawful acts, and in escaping detection therein; that they buy also from said employes precipitates, amalgam, and bullion, known to have been stolen; that they do not comply with the law which requires the purchaser of ores to keep a book in which shall be recorded all the particulars of such purchases; that, unless restrained by order of court, they will continue to buy stolen ores; that, by reason of the fact that each theft is usually of a small quantity of ore, it is almost impossible for the plaintiffs to detect it at the time; that they constitute repeated trespasses that would involve plaintiffs in a multiplicity of suits to recover the amounts taken; that defendants are insolvent; that plaintiffs have no adequate remedy at law; and that defendants by their acts inflict irreparable injury upon plaintiffs.

The prayer is that defendants be enjoined "from carrying on the business of purchasing knowingly stolen ores, concentrates," etc., in the said district, "and from purchasing, receiving or in any way handling or dealing with, directly or indirectly, in said mining district, any ores, etc., * * * which they may know, or have reason to believe, were stolen"; and for an accounting for all stolen ores theretofore purchased.

A demurrer to the complaint was overruled, and, on defendants' election to stand upon the demurrer, judgment was entered against the plaintiffs in error, and other defendants who were in default, perpetually enjoining and restraining them "from carrying on the business of purchasing knowingly stolen ores, concentrates, precipitates, amalgam or bullion which they or he may know, or have reason to believe, were stolen."

The overruling of the demurrer is assigned as error.

The principle ground of demurrer argued is that the complaint does not state facts constituting a cause of action.

It is objected that the purpose of the suit is to enjoin the commission of a criminal offense. It is pointed out that our statutes make the buying of stolen ore a felony, and that they provide an elaborate system of recording every purchase of ore, all of which provisions are intended to accomplish the precise purpose at which this suit aims.

Defendants in error reply that equity has jurisdiction to enjoin an action, even though it be criminal, if, at the same time, it protects personal or property rights. The question here presented, then, is: Do the facts alleged present a case falling within the principle last stated?

It is not to be questioned that, where the direct and immediate purpose of a suit in equity is to protect property, an injunction may issue, although incidently it enjoins the perpetration of a crime.

In the case at bar, plaintiffs below allege that, if the sale of stolen ores be prevented, the stealing of ores will thereby be discouraged, and plaintiffs' losses to that extent be decreased. No case is cited in which the jurisdiction of equity is sustained to protect property in this indirect manner.

In the case of *In re Debs*, 158 U. S 564, 30 L. Ed. 1092, 15 Sup. Ct. 900, on which defendants in error rely, the effect of the injunctive order was direct. The defendants in that case were enjoined from obstructing interstate commerce and the carrying of United States mails. It is not authority for the proposition maintained here by defendants in error.

They also rely on *People ex rel. v. District Court*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850, and quote from it as follows:

"Courts of equity have no jurisdiction of injunction to restrain the commission of criminal acts *which do not violate some personal or property right.*"

It is argued that the violation of plaintiffs' rights in this case is such as to bring it within the italicised portion of the above quotation. We think, however, that, for the reason above given, the case does not apply. The protection

of property rights in this case appears only by a course of reasoning, to-wit: That, if these defendants are prevented from buying stolen ores, the employes of plaintiffs who steal ore, finding it no longer profitable, will cease their thefts. The results of the injunction are, therefore, not determinate, but inferential only. The only actual and direct result is the enjoining of a criminal offense.

Defendants in error rely also upon *Kirby v. U. P. R. R. Co.*, 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913 B. 461, in which railroad ticket brokers were enjoined from purchasing special rate tickets. That case, however, is not in point, since it dealt, not with criminal offenses, but with acts which the court held to be fraudulent.

The injunction directly protected plaintiffs' rights.

Every theft is an invasion of some one's property rights. The fact that in this instance an injunction is sought only against a certain class is not material. There are other lines of business in which thefts are extremely common and difficult to detect. If one class may be enjoined either directly or indirectly from stealing, other classes may be treated in the same manner. Modern penal laws are intended both to punish the criminal, and to deter others from perpetrating like offenses. The purpose of the law, then, is to accomplish the very same end which the injunction would accomplish, according to the reasoning of defendants in error.

Where a criminal prosecution will effectually redress the plaintiff's wrong, he has no remedy in equity. 22 Cyc. 775.

The fact that the criminal statutes are not properly enforced was urged as a ground for injunction in *People v. District Court*, supra. This court, in discussing that charge in the complaint, said:

"It is a plain attempt, through the aid of a court of equity, to prevent the violation of the penal statutes of the state, and to confer upon that court the administration of the criminal law, solely because sworn officers neglect or refuse to perform their duty in this regard. The failure

of these officers to perform their duty constitutes no ground for the interference of a court of equity."

If it is so difficult to detect these thefts of ore—and, therefore, the criminal law is not enforced—there is no reason apparent why it would not be equally difficult to show a violation of the injunction, unless dependence be placed upon that part of it which enjoins the purchasing of ore which the buyers *have reason to believe have been stolen.* In such a case, one cited for contempt would not know what evidence he ought to be prepared to meet. It would open a wide field of conjecture and speculation, and make it possible for the court to inflict a penalty on grounds upon which no two persons might hold the same view.

Another effect of the injunction would be to deny one cited for contempt a trial by jury in what is in effect a criminal case. In other words, a court, without a jury, might convict persons of an offense which the statutes of the state make a felony, and, upon conviction, might inflict such punishment as to the court seemed proper.

This fact alone should limit the right to an injunction to cases in which its direct effect is the protection of rights or property, and where it is necessary to such protection. It is a truism that courts of equity are not fitted for the administration of criminal law, and attempts to extend their jurisdiction to that field, in any degree, should receive no favor from those whose duty it is to preserve the landmarks of the law.

The plaintiffs have as adequate a remedy in the premises as have others whose property is liable to be stolen, and the complaint does not state a cause of action.

The demurrer should have been sustained.

The judgment is therefore reversed.

Garrigues, Allen and Bailey, JJ., dissent.

No. 8636.

DEPRIEST *v.* THE PEOPLE.

CRIMINAL LAW—*Evidence—Hearsay.* Prosecution for the non-support of an illegitimate child of which defendant was alleged to be the father. A pathetic letter addressed by the prosecutrix to her mother, immediately after the discovery of her condition was received in evidence for the People, as well as statements of prosecutrix to third persons. *Held* error, and not rendered harmless by the fact that prosecutrix testified to the truth of the letter and of her statements.

Error to Denver Juvenile Court, Hon. Ben B. Lindsey, Judge.

Mr. C. A. PRENTICE, Mr. JOHN A. DEWEESE, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. BERTRAM B. BESHOAR, assistant attorney general, for the people.

Chief Justice Hill delivered the opinion of the court:

THE plaintiff in error was convicted of the non-support of his alleged illegitimate child.

The errors urged pertain to the admission of testimony. The mother testified that the relation between her and the defendant (which was with her consent), and which brought about the existence of the child, occurred at a certain rooming house in Denver, on October the 5th, 1913; that, about three weeks thereafter, and when she ascertained her condition as the result of such relation, she wrote her mother a letter concerning it and gave it to her upon going to work one morning. She identified this letter. The mother testified to receiving the letter. She was likewise permitted to identify it. Over defendant's objection, the letter was received in evidence and read to the jury. The attorney general admits that the admission of this letter, as well as the testimony of other witnesses as to what the mother of the child said to them concerning the

transaction, at later periods, and not in the presence of the defendant, was error, but maintains that it was harmless error, for the reason that the mother of the child testified to the truth of the contents of the letter, as well as to the truth of the substance of her statements to the other witnesses, as testified to by them, and hence that this letter, as well as the testimony of these witnesses, was but cumulative of these questions, for which reason, although erroneously admitted, the errors were harmless. This argument, though ably and ingeniously presented, ignores the elementary rules concerning evidence, and the rights of all defendants in connection therewith. The mother of the child was about seventeen, the defendant twenty. They lived with their respective parents on opposite sides of the street. The letter told the mother of the daughter's condition, and that the defendant was responsible for it. It set forth a history of their love affair, including a statement that this was the only time she had ever committed such a wrong; that she had told the defendant over the telephone of her condition; that in reply he abused her, also got scared, and told his mother something, and that she had sent him away, etc. It also contains heart-rending appeals for sympathy, together with the statements disclosing that she appreciated the seriousness of her condition, the disgrace to her family and self, concluding with the prayer and hope that the defendant would marry her or could be made to do so, and that everything would come out all right. In addition to being a complete and perfect self-serving declaration in support of her testimony, its contents is such as to appeal to the sympathy, passion and prejudice of any juror. The fact that the girl had testified to the material facts stated in the letter would not change the feeling that might have been aroused in the minds of the jurors by the heart-rending declarations contained therein; for this reason alone, it was prejudicial error to admit it. The fact that it was cumulative to the testimony of the girl, that the defendant was the father of the child, did not make it a harmless error. This question was passed

upon in *Connor v. The People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. 295, where two witnesses, Farley and Newcome, were permitted, over objections, to testify to statements made to them by the people's witness, Holliday (a detective), not made in the presence of the defendants, or either of them. In commenting upon this testimony, at page 380, the court said: "This was hearsay and clearly inadmissible." Continuing, at page 382, the court stated:

"The witnesses, Farley and Newcome, testified that they had no personal knowledge of the facts stated by Holliday, and were simply repeating the story told by him. The harmfulness of this can be readily seen. The witness Farley was at the time holding an important official position; he was a respectable citizen and possessed the confidence of the community, and the repetition by him of Holliday's story might give it a weight and credibility greater than would have attached to it when told alone by Holliday.

However this may be, the admission of this testimony was so violative of every rule of evidence that in itself it would compel a reversal of the case, and it becomes unnecessary to notice the further objections."

This declaration is applicable here. The defendant stood upon his legal rights under his plea of not guilty and otherwise did not attempt to attack the reputation of the prosecuting witness for truth and veracity; in such case, the burden was upon the people to establish his guilt beyond a reasonable doubt by competent testimony. So far as the record discloses, the mother of the prosecuting witness was a good citizen, and the repetition by her that the letter had been written and delivered, in connection with its contents, might give to the real issue a weight and credibility in the minds of the jurors greater than would have attached to it when told by the girl alone. This principle applies to the testimony of the other disinterested witnesses as to what the girl (in the absence of the defendant) told them

(concerning the material facts) some time after the transaction is alleged to have occurred.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

Mr. Justice White and Mr. Justice Teller concur.

No. 8907.

DILLEY v. PRIMOS CHEMICAL COMPANY.

MASTER AND SERVANT—*Contributory Negligence of Servant.* Plaintiff, an experienced miner, was, with another miner, ordered by his superior to operate a tram car for conveying ore from the mine of defendant.

The tramway in its lower reaches was upon a considerable declivity, and with many curves, all of which plaintiff knew. He attempted to ride a car without brakes, standing with one foot upon, "what would be the coupling", at the rear of the car, and holding with his hands. The car having jumped the track at one of the curves he was thrown and injured. There was no rule or direction that plaintiff should ride the car in this manner, or at all, and plaintiff was perfectly informed of the danger of his attempt, and that, uniting with his associate, so that both walking behind the car and holding it, at the steeper part of the grade it would reach its destination in safety, and without injury to those controlling it. *Held* that having himself chosen the dangerous method of performing the work, there could be no recovery.

Judgment for defendant upon a directed verdict affirmed.

Error to Montrose District Court, Hon. Thos. J. Black, Judge.

Messrs. CATLIN & BLAKE, for plaintiff in error.

Messrs. GOUDY, TWITCHELL & BURKHARDT, Mr. L. W. ALLEN, Mr. F. B. GOUDY, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action wherein the plaintiff in error seeks to recover damages against the defendant in error on account of the latter's alleged negligence. The cause was tried to

a jury. At the conclusion of plaintiff's evidence the trial court, on motion of defendant, instructed the jury to return a verdict in favor of the defendant. One of the grounds of the defendant's motion for a directed verdict, and the ground upon which the trial court granted the motion, was that the "evidence shows that plaintiff was guilty of negligence directly contributing to the injury."

The principal question presented for our determination is the propriety of the directed verdict, under the evidence and the circumstances of the case. We will therefore review so much of the evidence as is relevant to the matter of plaintiff's contributory negligence.

On April 14, 1914, the plaintiff below, plaintiff in error here, obtained employment from the defendant, a corporation, at its mine which it was then operating. The plaintiff was a workman of several years' experience, and of usual intelligence. During the first eight or ten shifts that the plaintiff worked, he was engaged in tramming ore, with the aid of another employee, in tunnel No. 5 of the mine. The two men conducted the car, when loaded with ore, from the breast of the tunnel to the ore bin by pushing. Plaintiff was next transferred by the defendant's shift boss to tunnel No. 7. After working one shift in the stope, the shift boss directed him to tram ore, and on the second shift in that tunnel the plaintiff and another workman acted as trammers. At this time they had the use of a tram car which was provided with a brake. On the following shift they had the use of a car which had no brakes. They noticed the absence of brakes on this car, but made no objection, and proceeded to tram. On the first two trips with this car the plaintiff's tramming partner rode the car while it passed over that part of its course which was down a steep grade. When it became time to make the third trip with this car, the plaintiff's working partner suggested that he, plaintiff, ride the car. In this connection the plaintiff testified as follows:

"And I stepped on and went with the car. I stepped on what would be the coupling, * * * with one foot, and hung on to the hind end of the car with my two hands, and

the other foot suspended in the air, in similar manner as partner rode on first two trips."

At the foot of the down grade part of the tramming course were curves, and then a short up grade, over which the cars had to be pushed by the two men. The plaintiff was injured on the first trip that he rode the car. In this connection he testified as follows:

"I went down grade all right, but I didn't get out of the tunnel. The car jumped the track at one of the curves at or near the foot of the grade, and I found myself sitting in the track between the rails, * * * and the car was standing on its front end on the track."

The evidence does not show any rule or direction by the employer or his agents that the plaintiff should ride the car, but does show that there was no necessity for riding the car. The plaintiff had the choice of pursuing a safer method of doing his work. As a reasonable and prudent person, he could have observed that the object of placing two men in charge of the tram car was that both might travel with the car, their hands on the same, in an effort to check the speed and steady the car on its progress down the grade, and prevent an accident of the kind that happened in this case. Before the accident the plaintiff made twelve to fifteen round trips over the tramming course in question, and knew where a loaded car would go down grade. He could have known, as a reasonable and prudent person, of the danger of riding the car without brakes, as it went over what he himself designated as "steep down grade." He was not obliged to act on the suggestions of his tramming partner, and by riding the car he knowingly selected the more dangerous method of doing his work. This court, in *Colo. & So. Ry. Co. v. Reynolds*, 51 Colo. 231, 116 Pac. 1043, said:

"Where a person has a choice of two methods of performing his work, the one safe and the other dangerous, and is aware of this fact, it is his duty to choose the safe method. If he does not, and chooses the method which necessarily exposes him to danger, which would have been avoided had

he chosen the other, and is injured, he can not recover for such injury."

In 18 R. C. L. 636, sec. 132, it is said:

"If the employee having an opportunity of acting in any one of two or more ways, one of which is less safe than another, and knowingly chooses the less safe mode, he is to be deemed negligent and disentitled to recover, although the employer may also have been negligent." See also 29 Cyc. 520.

It is true that to constitute contributory negligence, the act or omission of the person injured must be one which he could reasonably anticipate would result in his injury. 29 Cyc. 520. But the plaintiff's act comes within this rule. This view is supported by the opinion in *Miller v. Union Pacific Ry. Co.*, (C. C.) 4 Fed. 768, where it is said:

"In the second place, if the car on which plaintiff was riding when injured was known as a push car, and had no brakes or apparatus for controlling its movements, and if the plaintiff, knowing this, got on the car and rode down the grade, this was negligence, and the plaintiff can not recover.

"If he knew * * * that it could be controlled only by walking along by it and holding it back, and knowing that, he got into it with a number of other people to ride on a down grade, he took his chances. It was a clear case of contributory negligence."

To the same effect is *York v. K. C., C. & S. Ry. Co.*, 117 Mo. 405, 22 S. W. 1081.

Not only did the plaintiff choose the less safe way of working, but after getting on the car he took no precautions for his safety, and did not attempt to get off the car as the speed increased. He admitted that he could have stepped off before the car attained increased momentum, and that he knew from what he had seen before that the car gained a great deal of speed in going down grade.

At, or just before the plaintiff mounted the car, his tram-

ming partner, according to the testimony, spoke to him as follows:

"It is useless for me to ride all the time and you walk; you go with the car this time."

Whether this language be regarded as a suggestion, a command, or as assurance of safety, it is not binding upon, nor can it fix any responsibility upon the defendant, under the undisputed facts existing in this case. The tramming partner was a fellow-servant of equal grade with plaintiff, not a vice-principal nor an agent of the master with any authority over plaintiff. The plaintiff, in riding the tram car, did not, therefore, do so by the direction, or upon any assurance of safety, given by the master or a vice-principal.

The act of the plaintiff, in riding the ore car at the time of the accident, directly contributed to the production of the injury complained of; and, without it, the injury would not have happened. Assuming, but not deciding, that the defendant was negligent in the care or the construction of the tram car track, the plaintiff, nevertheless, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence. The circumstances, therefore, disclose contributory negligence on the part of the plaintiff, by reason whereof he is not entitled to recover damages. *Colo. Central R. R. Co. v. Holmes,* 5 Colo. 197; *Jackson v. Crilly,* 16 Colo. 103, 26 Pac. 140.

The facts are not in dispute and plaintiff's contributory negligence is evident and unquestionable. In such case the court may declare the fact established as a matter of law. *Colo. Central R. R. Co. v. Holmes,* supra. Where it affirmatively appears from the plaintiff's own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, it becomes the duty of the court, upon a motion made for non-suit, to decide, as a question of law, that the action can not be maintained. *Behrens v. K. P. Ry. Co.,* 5 Colo. 400. Or, the court may in such case direct a verdict for the defendant. *Guldager v. Rockwell,* 14 Colo. 459, 24 Pac. 556.

There was no error in directing a verdict for defendant in the instant case. The judgment of the District Court will therefore be affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8908.

SHAW ET AL. *v.* BOND.

1. PLEADINGS—*Judgment on the Pleadings—Motion—Presumptions.* On motion for judgment on the pleadings the truth of the pleading in question is assumed, and nothing pleaded in contradiction thereof is taken as true.
2. IRRIGATION—*Reservoirs—Canals—Taxation.* A ditch conveying water to a reservoir, whence it is distributed solely for the irrigation of the lands of those entitled to the ditch, is not subject to taxation, separate from the land irrigated.

   Neither is the reservoir nor the bed thereof.
3. INJUNCTION—*To Restrain the Collection of a Tax,* is allowed, where the tax is levied without authority, and the want of authority is not apparent on the face of the record, e. g., a tax levied upon works for the irrigation of land, used exclusively for watering the land of those entitled to the works.

Error to Jefferson District Court, Hon. H. S. Class, Judge.

Messrs. SMITH, BROCK & FERGUSON, Mr. JOHN P. AKOLT, for plaintiffs in error.

Mr. WILLIAM A. DIER, Mr. J. W. BARNES, Mr. JOHN F. MAIL and Mr. GEORGE B. CAMPBELL, for defendants in error.

GARRIGUES, J.

THIS suit in equity by injunction is brought by plaintiffs in error against the Assessor, Treasurer and Board of County Commissioners of Jefferson County to have certain taxes assessed and levied against the dam, the dam and reservoir site, and the inlet ditch or canal of Standley Lake reservoir, declared and adjudged invalid; and to restrain the collection of the tax and the issuance of a tax deed. By the dam and reservoir site is meant the surface

of the earth upon which the dam and banks stand, and the basin or bed of the reservoir inundated.

The complaint alleges that the Reservoir & Irrigation Company, one of plaintiffs in error, was organized to construct, operate and maintain a system of ditches, canals and reservoirs in Denver, Adams, Arapahoe, Jefferson, Boulder, Gilpin, Grand and Weld Counties, Colorado, for the purpose of diverting, storing and distributing to its stockholders only, water for the irrigation of lands owned by its stockholders; that it is a mutual ditch company organized for the purpose of constructing, operating and maintaining a system of ditches, canals and reservoirs, for the distribution of water for irrigation to its stockholders or members only; that its properties have at all times been owned and used exclusively for such purposes, and that its ditches and canals and reservoirs are owned and used exclusively by individuals or corporations who are stockholders of the company, for irrigating lands owned exclusively by such individuals or corporations, or the individual members thereof, and are not subject to taxation separate from the taxation of the land upon which the water right is applied; that it owns ditches, canals and reservoirs for collecting and conveying water from one county, to be distributed in another county or counties; that it owns a certain reservoir called Standley Lake, and its inlet ditch called Croke Canal, situated in Jefferson County, which are integral parts of the irrigation unit, and were constructed, and are operated and maintained, for the purpose of diverting and collecting water in Jefferson County, to be conveyed and distributed in that and other counties for irrigating the lands of its stockholders in that and other counties; that the other plaintiff in error, Alva Shaw, is the duly appointed and acting receiver of the company; that in 1909 the County Assessor, notwithstanding the property was exempt from separate taxation, listed, valued and assessed for taxation purposes in Jefferson County, the dam, dam site, and reservoir site, or bed of the reservoir, which taxes were extended upon the assessment roll

for that year; that the dam and reservoir sites were listed at the value of $18,440.00, and the dam was listed and valued at $40,000.00; that in 1910 the County Treasurer sold the property *en masse* for the taxes of 1909, for the sum of $1,723.46, and issued a tax certificate to the purchaser, and threatens, and is about to issue a single tax deed therefor; that the property was again assessed in like manner for the taxes of 1910 and 1911, which were for those years paid by the holder of the tax certificate; that Croke Canal extends from its headgate in Clear Creek to the reservoir, and was assessed for taxation for the years 1910, 1911 and 1912; that in 1910 it was valued for taxation at $22,530.00, and the tax was $682.93; in 1911 it was valued at the same amount, and the tax was $684.67; in 1912 it was valued at $30,040.00, and the tax was $842.79, and on December 23, 1912, it was sold for taxes, and bid in by the county and a certificate issued to the county; that the time of redemption of the reservoir from tax sales will expire December 24, 1913; that August 2, 1913, the treasurer published the usual notice that the holder of the certificate had made application to him for a treasurer's or tax deed, that the time for redemption would expire December 24, 1913, and unless redeemed on or before that date, a deed would be issued and delivered as provided by law; that the treasurer threatens and is about to issue a deed to the holder of the certificate; that the assessments, levies, taxes and tax sales embrace and apply to the reservoir and the ditch used to divert water from Clear Creek into the reservoir, called Croke Canal, and to no other land or property; that these county officers continue to assert the right to assess the canal and reservoir, and to collect the tax by the sale of the properties; that the levy of the tax has created a cloud upon, and the issuance of a deed will cast a cloud upon, the title of the company to the ditch and reservoir, and result in irreparable damage, for which there is no plain, speedy or adequate remedy at law; that it will be harrassed by a multiplicity of suits, and that a tax deed will disturb its occupancy of the properties, and deprive it

from maintaining and operating the ditch and reservoir, to the irreparable injury of its consumers and stockholders; that it is, and at all times has been ready, willing and able to, and offers and tenders such amount, if any, of the taxes as the court may find to be due and owing. Prayer that the assessments, levies and tax sales be adjudged invalid, and that the issuance of a tax deed be enjoined.

After answers and replications had been filed, the case came on for trial before the court, whereupon defendants moved the court for judgment on the pleadings, which motion the court sustained and ordered the cause dismissed. January 26, 1916, the court overruled the motion for a new trial, and entered a final judgment of dismissal on the pleadings in favor of defendants, and plaintiffs bring the case here on error.

GARRIGUES, J., after stating the case as above:

1. The constitution provides:

"Ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."

The statute is substantially the same. Sec. 3, Art. 10, Constitution: Sec. 17, p. 47, Revenue Laws, 1902.

The statute also provides that the term "real estate" includes: First, land; second, minerals under the land; third, improvements upon the land, and that the term "improvements" shall include all buildings, fences and water rights. Sec. 13, p. 45, Revenue Laws 1902.

The judgment being upon defendants' motion for judgment on the pleadings, we must assume for the purposes of the case that the allegations of the complaint are true, and that no allegations of new matter in the answer are true. The first point involved is whether the ditch and reservoir were subject to taxation separate from the lands upon which the water right is used, and the second, whether plaintiffs are entitled to injunctive relief.

We will first dispose of the question of taxation of the canal, then of the dam, and then of the dam and reservoir site. The constitution and statute provide that canals, ditches and flumes owned by corporations and used exclusively to irrigate their lands or the lands of individual stockholders thereof, or owned by individuals and used exclusively to irrigate their lands, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose. This constitutional provision does not exempt such properties from taxation. It provides that they shall not be separately taxed, and in *Empire Canal Co. v. Board,* 21 Colo. 244, we held this to mean that the canal shall not be taxed separately from the land upon which the water is used; that the exemption from separate taxation applies to (a) canals owned by one or more individuals, used exclusively to irrigate their lands; (b) canals owned by corporations, used exclusively to irrigate their lands or the lands of their stockholders; (c) canals owned in part by individuals and partly by corporations, used exclusively to irrigate lands of either or both. In other words, canals owned and used exclusively for irrigation of lands owned by the owners of the canals.

The Farmers' Reservoir & Irrigation Company owns the ditch and reservoir in question. They are used exclusively by its stockholders for the irrigation of their lands, the stock representing the consumer's interest in the canal and reservoirs, the complete ownership thereof being vested in the corporation. The question is whether they are subject to taxation separate from the land upon which the water right is applied. So far as Croke Canal is concerned, it comes within the rule announced in *Empire Co. v. Board,* supra, and is not subject to separate taxation.

In *Kendrick v. Twin Lakes Co.,* 58 Colo. 281, we held a reservoir dam which impounded water in a reservoir for the use of stockholders in a mutual ditch and reservoir company for irrigation could not be separately taxed as an improvement upon the land upon which the dam stands; that the dam had no distinct value as an improvement upon

the land on which it stood, but was a burden; that whatever value the dam possessed was represented and included in the water right, which constituted the essential thing of value, and that such water right, under our revenue laws for taxation purposes, are to be listed and valued like real estate, as improvements on the land upon which the water is used. So neither the Croke Canal nor the reservoir dam of the Standley Lake reservoir are subject to separate taxation.

The inquiry now goes a step further and we must determine whether the land upon which the dam stands, and the land inundated by the water in the reservoir, that is, the bed of the reservoir, is subject to separate taxation, or whether their value is included in the water right similarly to ditches, dams and headgates.

Land is a term narrower and more restricted than real estate, and means the solid part of the earth's surface. Real estate is a broader term, including the land and improvements thereon. Fences and buildings are real estate, but not land. So are water rights. Under our revenue act for the purposes of taxation, real estate includes land, minerals under the land and improvements on the land, and water rights are declared to be improvements on the land where they are used; hence, it follows that water rights are real estate and must be listed and valued like buildings, apart from the land, but as improvements on the land where the water is applied. Land comprising the bed of a reservoir, or the bed of the dam like this, storing water for irrigation, is as much an integral part of the whole system as the land comprising the bed of the ditches and the dam of the reservoir. Water rights of mutual ditch and reservoir companies embrace and include the value of the land comprising the bed or site of the reservoir and dam, and the stock represents the consumer's interest therein, though the title to the property vests in the corporation. Ordinarily the value of a mutual irrigation system depends upon the cost of the enterprise as a whole, which controls to some extent the value of the water rights, and this value includes and

embraces not only inlet and outlet ditches, headgates and dams, but the land upon which they stand and the bed of the reservoir as well. When water rights are taxed in connection with the land they irrigate, the unit is taxed as a whole. The situs for taxation is declared by statute to be upon the land where the water is used. There can be no material distinction for purposes of separate taxation, between the ditch, the headgate and dam, and the bed of the dam and reservoir which supplies the water to be carried through the ditch, where all are owned by a mutual irrigation company and the water used exclusively by its stockholders to irrigate their lands. The same rule which holds that the value of the canal, headgate and dam is represented and included in the value of the water right applies with equal force to the land upon which the dam stands and the bed of the reservoir. We therefore conclude that the bed of the reservoir and the land upon which the dam stands are not subject to separate taxation.

2. The second point is whether plaintiffs are entitled to injunctive relief. This tax was not merely irregular, erroneous or illegal. The property was not subject to separate taxation, and the tax imposed was therefore unauthorized. On the face of the record, however, it appeared to be valid, which constitutes a cloud upon the title if not corrected by judicial decree, and unless the assessment of taxes on the property in the future is restrained, there will be nothing to prevent its repetition. The object of the action is not only to rectify the error in this particular instance, but to establish as well the correct rule relative to similar cases in the future.

We think a tax assessed where no tax is authorized is void, and if this does not *prima facie* appear from the face of the record, a suit in equity will lie to have it so declared. Where an exemption from taxation has been established, for property used exclusively for religious worship, schools or charitable purposes, we have never hesitated to grant an injunction restraining the collection; and the same rule should apply to mutual ditch and reservoir companies. We

are therefore of the opinion that plaintiffs were entitled to injunctive relief.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Decision *en banc.*

No. 8921.

CARLTON *v.* CAMFIELD ET AL.

1. EXECUTORS AND ADMINISTRATORS—*Rights and Authority.* The estate of a decedent is not, in any practical sense, in the custody of the law. The executor has no greater right than the testator had in his life time. Pledge of shares in a corporation by testator, not registered within the statutory limit. The objection of the executor to its registration, is without effect.
2. CORPORATE STOCK—*Transfer—Registration.* Sec. 870 of the Revised Statutes does not provide for a public record. Creditors of a stock holder are entitled to information as to the shares standing in his name only upon having instituted an action, and becoming entitled to a levy upon the debtor's holdings, under Rev. Stat. 3618, 3619.

   The holder of an unregistered transfer has an equitable title, which the corporation is bound to recognize and complete by registration, even after the statutory limit, when the transferee presents himself before any levy attempted under secs. 3618, 3619.

Error to Weld County Court, Hon. Herbert M. Baker, Judge. En banc.

Mr. JOHN T. JACOBS, for plaintiff in error.

Mr. CHARLES F. TEW, Mr. WALTER E. BLISS, for defendants in error.

Mr. N. WALTER DIXON, Mr. THOMAS J. DIXON, *amici curiae.*

Opinion by Mr. Justice Teller:

THIS cause comes before us on error to the County Court, which disallowed the claim of plaintiff in error as a secured claim against the estate of D. A. Camfield, deceased. There is no dispute as to the facts, the matter having been heard upon a stipulation, or agreed case. It appears that, on Feb-

ruary 10, 1912, D. A. Camfield became personally liable on a promissory note, to secure which he delivered to the payee of said note certificates for 100 shares of stock in the Farmers Bank and Trust Company of Greeley, Colorado, on which certificates was indorsed an assignment thereof, in blank, with power of attorney to transfer said shares; that within sixty days thereafter the plaintiff in error became the holder and owner of said note, and the holder of said stock certificates; that no note of said pledge was made, or attempted to be made, on the books of said company within the sixty days allowed therefor by section 870, R. S. 1908; that on the 9th day of November, 1914, said D. A. Camfield departed this life, and thereafter defendants in error, John A. Camfield and Lottie A. Camfield, duly qualified as executors of the last will and testament of said decedent; that on October 9, 1915, the plaintiff in error made demand upon said company that a memorandum of said pledge, as required by said statute, be made on its books; that said demand was refused; that the refusal of said company to note on its books said memorandum was not requested by any creditor of the estate of said decedent, but was requested by the said executors; that said estate is insolvent; and that no attempt has been made by any creditor of said estate to levy upon or attach said shares of stock.

It further appears that defendant in error, the Union National Bank, having an allowed unsecured claim against said estate, was permitted to intervene, and object to the granting of plaintiff in error's petition for leave to sell said pledged shares, the attorneys for said executors appearing also for said intervenor.

For plaintiff in error it is urged that the executors have no right to act for creditors of an estate in bringing about an intervention, as in this case; while the executors contend that they were but performing a duty to protect the estate in the interest of all the creditors. In the view we take of the case, it is unnecessary to determine the question thus raised.

That part of section 870, R. S. 1908, which provides for noting pledges of stock reads as follows:

"And any and every such stockholder, creditor or representative shall have a right to make extracts from such books, and no transfer of stock shall be valid for any purpose whatever except to render the person to whom it shall be transferred liable for the debts of the company according to the provisions of this act, unless it shall have been entered therein, as required by this section, within sixty days from date of such transfer, by entry showing to and from whom transferred; or, in case of the pledge of any stock, a memorandum be made upon the books of said company, showing to whom and for what amount the stock was pledged.

It is conceded that under this statute an unregistered transfer of shares is valid as between the transferrer and the transferee; also, that it is not valid as against attaching or execution creditors, unless the transferee has done all in his power to procure the registration of the transfer.

The question here presented is as to the validity of an unregistered transfer of shares as against creditors of an insolvent estate, whose claims have been allowed, before an attempt was made to register such transfer.

The position of defendants in error is that, upon the appointment of the executors, the estate was taken into the custody of the court for the benefit of creditors.

It can not be said, however, that the executors had any rights which their testator did not have at the time of his death. Since he could not have recovered possession of the certificates without paying the debt, they can not do so. They stand in his shoes, and are bound by the transfer. *Shires v. Allen*, 47 Colo. 440, 107 Pac. 1072. Clearly, then, these shares were not in *custodia legis* in any practical sense. The pledgee's rights were not changed by the death of the pledgor, and the executors had only the right to redeem the shares, or to receive any surplus that there might be on their sale as a pledge.

If, then, the pledgee could have had the registry made, after the sixty days, while Camfield was living, he could do it also after Camfield's death. Counsel cite cases holding an unregistered transfer void as against creditors of the transferrer, and assume that the term "creditor" includes all persons to whom debts are owing. An examination of the cases shows that in every instance the court was dealing with a *lien* creditor.

Our statutes do not, by express provision, make an allowed claim a lien; and no authority is cited to show that it is ever so considered in the absence of a statute to that effect.

We find in the statute under consideration nothing which indicates that it was intended for the protection of a creditor who has no lien.

One purpose of the statute is evident when it is considered with sections 3618 and 3619, R. S. 1908. The first named section requires officers of a corporation to furnish an attaching officer a certificate showing the number of shares owned by the debtor; and it would be of little effect if transfers were not recorded so as to show the ownership. The next section authorizes a levy on shares standing in the name of the defendant in an action, and prescribes the method therefor. Without a requirement that the transfer be recorded, these sections might have no practical effect, since a levy might prove to have been made on shares already transferred.

It should be observed that section 870 does not provide for a record which is to be public, and so operate as a notice to the world. The right to inspect the transfer record is given only to stockholders, and creditors of the *corporation*. It gives no information to creditors of a stockholder, and they can ascertain from it what, if any, shares a debtor owns, only when they have begun litigation and become entitled to levy on or attach the property of their debtor. The record seems, therefore, not intended for the benefit of simple creditors, but of litigants who are taking steps to collect their debts. Such records are not public unless the

statute obliges the corporation to expose them to public inspection. 2 Thompson, Corporations, sec. 2411. In *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145, it was held that a statute which made a transfer of shares invalid if not entered on the books of the corporation was for the protection of the corporation and purchasers, and that it did "not operate as a registration law in the interest of creditors of stockholders, for the reason that the books of the company are not required to be kept open for the inspection of the public."

In *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, it is held that a transferee of shares not transferred on the corporation books has full title as against the transferrer, but only an equitable title as against the corporation; which title, however, the corporation is bound to recognize, and permit to be ripened into a legal title, when the transferee presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer.

The case further holds that a corporation is liable in damages to the transferee of an unregistered certificate if, with knowledge of such transfer, it issues certificates to a subsequent purchaser from the original transferrer.

Under this authority the Trust Company was bound to make the requested record of the pledge of the shares in question.

We are of the opinion that creditors without liens have no standing to protest the registry of transfers or pledges of shares. Plaintiff in error had done all in his power to secure the registry of the stock pledged to him, and his rights were the same as if the registry had been made. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183. He was, therefore, entitled to have his claim allowed as a secured claim.

The judgment is reversed, and the cause remanded for further proceedings in harmony with the views above expressed.

Judgment reversed.

Mr. Justice White not participating.

No. 8951.

CORYELL *v.* OLMSTEAD ET AL.

1. FRAUD—*Preferring Creditor.* Even by an insolvent, is not iniquitous.
2. —— *Confession of Judgment,* for a debt justly due is not a fraud upon other creditors, even though it affords a preference, and may have the effect to delay other creditors. That the defendant might have delayed the creditor in whose favor the confession is made, and that the confession is to bear interest at less than the legal rate, and the debtor is promised the assistance of creditor in disposing of his property, *held* no evidence of fraud.
3. APPEAL AND ERROR. On bill by creditors against an insolvent debtor to vacate a confessed judgment, a receiver of all the properties of the insolvent was appointed, without hearing the creditor in whose favor the judgment was confessed, although he was party to the action. Afterwards the judgment confessed was vacated, and the execution levied thereunder set aside. Upon reversing the residue of the judgment, the order appointing the receiver was not disturbed.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. JOHN L. NOONAN, Mr. J. W. DOLLISON, for plaintiff in error.

Mr. EDWIN C. KINGSBURY, for defendant in error.

GARRIGUES, J.

DEFENDANTS in error, Olmsted and Kingsbury, commenced this suit November 15, 1913, as a direct attack upon a confessed judgment for $7,809.15, entered against one Fawcett July 22, 1913, in favor of Coryell, plaintiff in error. The purpose of the action was to secure the cancellation of the judgment, enjoin and restrain the sheriff of Garfield County from selling the property of Fawcett on execution, and to procure the appointment of a receiver to take charge of the property.

The Pleadings.

The complaint alleges that June 24, 1913, Kingsbury recovered judgment against Fawcett for $170.40, on which

execution was issued and placed in the hands of the sheriff August 21, 1913; that September 15, 1913, Olmsted obtained a judgment against Fawcett for $468.26, and forthwith caused a transcript to be filed in the office of the clerk and recorder's office; that no part of the judgments has been satisfied; that Fawcett owes more than $22,000.00 and is insolvent; that she is the owner of 560 acres of land in Garfield County; that July 22, 1913, in case No. 1655, while insolvent, and for the purpose of hindering, delaying and defrauding her creditors, Fawcett confessed judgment in favor of Coryell in the sum of $7,809.15, in a suit brought by Coryell against Fawcett in the District Court of Garfield County; that the judgment in that case is based upon certain promissory notes alleged to have been given by Fawcett to Coryell, which were not exhibited in court nor tendered for cancellation, and, if they existed—which is denied—it is alleged were executed without valid consideration, and for the purpose of hindering, delaying, defrauding and cheating her creditors; that September 7, 1913, Coryell caused the sheriff to levy upon the property of Fawcett, and is about to sell it on execution; that there was filed with the confession of judgment an agreement of date July 21, 1913, signed by Coryell, to the effect that the judgment should not draw a greater rate of interest than 6 per cent from date until satisfied; that the judgment so confessed upon the suit and complaint of Coryell was entered by collusion and fraud between Fawcett and Coryell, for the purpose of giving preference to Coryell, who had no other security, and that plaintiffs and other creditors will be defrauded of their just claims unless a receiver be appointed to take charge of the property and assets of Fawcett. Prayer that the judgment be set aside, and the suit in that case dismissed; that a receiver be appointed, and Coryell enjoined from selling under execution, and for general relief. November 17, 1913, Fawcett, by separate answer, admitted all the allegations of the complaint and petition, consented to the appointment of a receiver, and alleged that she owned other property in addition to that

described in the complaint. November 18 the court entered a finding on the pleadings, that the actual parties in interest were Fawcett and plaintiffs, and without notice to Coryell, entered an order appointing a receiver of all the property and effects of Fawcett, and enjoining and restraining Coryell from proceeding further in any manner under the judgment of confession against Fawcett in case No. 1655. January 5, 1914, Coryell answered, alleging that July 22, 1913, she obtained judgment by confession against Fawcett for $7,809.15, upon three promissory notes which were given for a valid consideration, and were considered merged in the judgment; admitting the sheriff levied on the property, and had a custodian in charge thereof until displaced by the receiver; that it was agreed, in anticipation of the judgment that it should draw 6 per cent interest; but denying that a sheriff's sale on execution will defraud plaintiffs, or any of Fawcett's creditors, of their just dues, or that the judgment was confessed for the purpose of hindering and delaying creditors.

The Evidence.

The uncontradicted evidence shows that Fawcett rented from Coryell what is known as the Red Soil Ranch for the years 1912 and 1913, at the agreed price of $600.00 a year; that March 21, 1913, Fawcett owed Coryell $600.00 for the rent of 1912, $49.25 for hay, and $100.00 for a gasoline engine, a total of $749.25; that Coryell received from Fawcett, to be credited on this account, $225.00, leaving a balance due on settlement, of $524.25, for which she gave Coryell a promissory note dated March 21, 1913, payable in thirty days, with interest at 10 per cent, no part of which was paid, and which entered into the confession of judgment; that March 31, 1913, Fawcett gave Coryell another note for $600.00, the consideration being the rent for the ranch for 1913, with interest at 10 per cent, no part of which was paid, and which also entered into the confession of judgment; that January, 1911, negotiations were commenced by Fawcett which resulted in the purchase, or agreement to purchase from Coryell, what is

called the Pierce tract, at the agreed price of $6,000.00. The deed to Fawcett was made and acknowledged in Denver April 26, 1911, at which time a note for $6,000.00 was prepared, representing the purchase price; that the papers were not exchanged until October 20, 1911, when Fawcett signed and delivered the note to Coryell, who delivered the deed. Fawcett withheld this deed from record until July 17, 1913, when Coryell ascertained that creditors had already and were obtaining judgments against Fawcett, which were becoming liens against the land, while the $6,000.00 note for its purchase price was unsecured. This note is dated April 26, 1911, the day the deed was acknowledged, and matured January 1, 1918, with interest at 6 per cent, payable annually, the first interest payment to be due January 1, 1913. No part of this note was paid, and it was also included in the judgment by confession, less the interest, which was deducted to October 20, 1911, the date when the note was delivered and the deed accepted. It provided that in the event of non-payment of interest when the same should become due, and after thirty days' notice to Fawcett, that the $6,000.00, with accrued interest, should become due and payable. It contains another statement that the note is given for the purchase price of the land, on which it shall be a lien. Coryell began a suit on these three notes by filing a complaint in the District Court, upon which Fawcett confessed judgment July 22, 1913. As an inducement for this judgment, Coryell agreed in writing that the judgment should draw interest only at the rate of 6 per cent, the same as the $6,000.00 notes. This judgment the lower court set aside and vacated, upon the ground that Fawcett had confessed it for the purpose of hindering and delaying creditors. The court found the $6,000.00 was based upon a valid consideration, but that it was not due when the judgment was confessed, and for this reason should not prorate with other claims against the Fawcett estate. The judgment as a whole was set aside, the levy on execution vacated, and the property turned over to the receiver, thereby destroying the judgment lien Coryell had

obtained, and leaving her an unsecured creditor for the amount of the two notes, aggregating $1,124.25.

GARRIGUES, J., after stating the case as above:

1. The only point in the case relates to the finding of the court that Fawcett confessed judgment for the purpose of hindering and delaying creditors. There is not a particle of evidence upon which to base such a finding or conclusion. The court seems to have proceeded upon the theory that plaintiffs and Fawcett were the only interested parties in this suit. Not so. Coryell was vitally interested. The pleadings were not evidence against Coryell, and constituted no basis for setting aside the judgment. It was the evidence given in court by Fawcett, and not her answer, that constituted her evidence against Coryell. There is no evidence to warrant an inference that the judgment was confessed wantonly, covinly, or maliciously, for the purpose of hindering or delaying creditors. Fawcett testified she purchased the Pierce tract for $6,000.00; that she considered it worth that sum; that she gave her note for the purchase price, expecting and intending to pay it, and that she owned the land, and owed the note. She says Coryell represented that the confession of judgment would save costs, and promised in the event she would agree to the entry of judgment, that it should draw only 6 per cent interest, instead of the legal rate, and that she would hold off execution, and assist her in securing a loan on the land by which she could pay all her creditors. If true, this was only a matter between Coryell and Fawcett, was of no concern of plaintiff's, and tended in no way to establish that Fawcett confessed judgment for the purpose of hindering or delaying creditors.

It is evident that no judgment could be confessed, except by agreement, which must necessarily precede the judgment. The judgment being based upon valid obligations, the agreement in advance to confess it in no way affects its validity.

Confession of judgment is not a badge of fraud. Preferring creditors, when one is insolvent, is not iniquitous,

and there is no evidence that this is a vicious judgment. It was practicing no fraud upon plaintiffs to take a confession of judgment based upon just and valid obligations, even though Fawcett was insolvent, and it worked a preference of creditors. The burden was upon plaintiffs to show that some equitable rights of creditors were invaded by the confession of judgment, which they failed to do. The court seems to have set aside the judgment merely because it hindered and delayed creditors, and this was error. *Burr v. Clement*, 9 Colo. 1-8, 19 Pac. 633; *Stockgrowers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 442; *Walton v. First Nat. Bank*, 13 Colo. 265, 22 Pac. 440, 5 L. R. A. 765, 16 Am. St. 200; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Sweet v. D. & R. G. Co.*, 59 Colo. 134, 147 Pac. 669; *Eversman v. Clements*, 6 Colo. App. 224, 40 Pac. 575; *Wilson v. American Nat. Bank*, 7 Colo. App. 194, 42 Pac. 1037; *People ex rel. v. Rio Grande Co.*, 11 Colo. App. 124, 52 Pac. 748.

In *Sweet v. D. & R. G. Co.*, supra, it is said:

"We have yet to learn that there is any iniquity in consenting to a judgment upon just and valid obligations."

In *Walton v. First National Bank*, supra, it is said, at page 276:

"It is not to be understood from this opinion that, in the absence of statutory restriction, a debtor may not, under ordinary circumstances, lawfully give preference to one creditor over others; nor that it is a badge of fraud for a creditor to secure such preference."

In *Sutton v. Dana*, supra, it is said:

An insolvent "may lawfully prefer some of his creditors to others, and pay some of them in full, leaving others partially or wholly unpaid so far as he should be without means of payment. * * * The law permits an insolvent debtor to make choice of the creditors he will pay, and the mode or means by which he will make such payment, and that something beyond such preference or payment must appear before the transaction is to be considered fraudulent. The preference of creditors by a failing debtor is not necessarily fraudulent."

The court properly held there was no fraud in the account upon which judgment was based; but found it was confessed for the purpose of hindering and delaying creditors. We have seen that an insolvent debtor may prefer creditors, and it follows as a necessary consequence, if he prefers one creditor over another, either by assignment, payment, or confession of judgment, that it will hinder and delay other creditors. It would be impossible for an insolvent debtor to prefer one creditor over another without hindering and delaying other creditors, and if that is what is meant by the rule regarding hindering and delaying creditors, any preference would bring about such a result. In *Burr v. Clement*, supra, it is held that the hindering and delaying meant by the law, as vitiating an assignment, is that hindering and delaying intended to be produced by the assignor through covin, malice, or for his own benefit and advantage.

This rule applies equally well to a confession of judgment. There is not the slightest evidence that the confession of judgment in this case was covinly, or maliciously, or wantonly made by Fawcett with intent to hinder and delay creditors, or that she derived any unlawful, invalid or improper advantage, or any favor or benefit of any kind over her creditors by her action in that regard.

The court found that the $6,000.00 note was not due when judgment was confessed, and for that reason held it was not a valid claim against the estate of Fawcett. This was error. A judgment by confession is a judgment by agreement or consent. It is an admission that the demand is just and valid, and is a waiver of all technical defenses. Fawcett's own evidence shows that she could not have prevented a judgment on the $6,000.00 note, although she might have delayed it until the notice was given, or caused two suits to be instituted. Instead of doing this, she consented to the judgment by which the provision regarding the thirty days' notice was waived. No doubt she could waive the notice if she wished, and the confession of judgment certainly waived it.

The judgment is reversed and the cause remanded with directions to the lower court to enter a judgment in accordance with the views herein expressed, but without interfering with the order appointing the receiver.

Reversed and remanded with directions.

Chief Justice Hill and Mr. Justice Scott concur.

No. 8986.

ART INSTITUTE OF CHICAGO *v.* DENISON ET AL.

EQUITY PRACTICED—*Modifying Decree.* A fund being held by a trustee, under appointment of the District Court, a firm of attorneys asserted an attorney's lien upon the shares of sundry of the beneficiaries, for services rendered in establishing their right. The final decree made no mention of the claim of the attorneys. Later on, one asserting a claim to this share of the fund, the cause was opened and a decree entered expressly reserving the right of the attorneys to assert their lien, and upon further litigation the trustee was directed to pay the claim of the attorneys. *Held* that the fund being at all times under the control of the court, and the right of the attorneys to prosecute their claim expressly reserved in the modified decree, the fact that the attorneys' lien was not adjudicated in the original decree was immaterial.

Error to Denver District Court, Hon. H. P. Burke, Judge. Department.

Mr. PHILIP S. VANCISE, for plaintiffs in error.

No appearance for defendant in error Denison.

Mr. PAUL KNOWLES, for defendants in error Bicksler, Bennett and Nye.

Opinion by Mr. Justice Teller.

THE defendant in error was, in a proceeding in the District Court, appointed trustee of a fund of which there were several beneficiaries.

When the fund was ready for distribution, a firm of attorneys filed in the cause an attorney's lien on the shares of several of the beneficiaries for services rendered in es-

tablishing their right to share in said fund. The trustee later filed a supplemental complaint in the cause, setting forth the names of the parties claiming an interest in the fund, including the said attorneys, and asking that the court ascertain and direct how distribution should be made.

The attorneys asserted their claim by answer, and their right to it was put in issue by replication.

A decree was entered, and approved by one of said attorneys, without mention of the lien claim, except that it recites that all claim to lien on the share of Helen L. Hannum, one of the beneficiaries, had been waived by said attorneys in open court.

It does not appear that the right to said lien was litigated on the hearing on the distribution of the fund, but a one-twelfth interest was directed to be paid to one of the attorneys whose firm claimed a lien on it. It is the lien on this interest which is the subject of this controversy. The court retained jurisdiction of the distribution of said fund.

There after the plaintiffs in error filed a petition in intervention, claiming said one-twelfth interest under the will of the beneficiary who was entitled to it. The intervention was allowed, and the decree opened and modified, so as to give to the plaintiffs in error said interest, so far as it had not been paid over to the heir at law of their testatrix.

The claim of the attorneys was recited in the decree, which was stated to be without prejudice to their right to assert said claim.

The trustee paid to the Art Institute all the money which it claimed except the sum of $134.45, which he retained because of said lien claim.

Thereupon, the plaintiffs in error filed a petition in said cause, setting up the aforementioned proceedings, alleging that the lien claim was barred by the statutes of Illinois, where the estate of the deceased beneficiary was under administration, and praying that the trustee be ordered to pay to petitioners the sum retained for the lien claim.

On answer, replication and evidence taken, the court found for the respondents, and directed the trustee to pay their claim.

Plaintiffs in error urge that, since the right to the lien claim was in issue on the first hearing, it was adjudicated, and that, there being no allowance of it, the decree is final as to it.

It is unnecessary, because of the subsequent proceedings, to determine what might have been the effect of the decree, if it had not been modified.

It is to be observed that the decree was opened on the application of the plaintiffs in error for their benefit, and that the right of the attorneys to assert their claim was expressly reserved in the amended decree; the trustee being required only to pay over to the intervenors' attorney such sums as "belonged" to their testatrix.

When the trustee, knowing that the attorneys still had full right to assert their claim, declined to recognize the right of the intervenors to the full sum, the plaintiffs in error invoked the aid of the court to recover it.

The fund was at all times under the control of the court, and, when the plaintiffs in error submitted themselves to its jurisdiction and obtained the relief originally sought, they could not be heard to say that the right to the claim depended upon the action of any other court, either in Illinois or of this state, even had there been no lien on the fund.

They cannot recognize the jurisdiction so long as it is exercised in their favor, and deny it when they cease to profit from it.

No attack is made upon the justice of the claim, and the court appears to have followed the law and the dictates of justice in the judgment rendered.

The judgment is accordingly affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 8989.

FIRST NATIONAL BANK OF FORT COLLINS *v.* SHAFER ET AL.

FRAUDULENT CONVEYANCE—*Chattel Mortgage.* Mortgagee of chattels permits the mortgagor to dispose of a considerable part of the mortgaged goods, and appropriate the proceeds to his own use. *Held* a fraud upon other creditors of the mortgagor, invalidating the mortgage and that possession taken by the mortgagee did not affect the result.

Error to Weld County Court, Hon. Herbert M. Baker, Judge.

Messrs. LEE & SHAW, for plaintiff in error.

Mr. JOHN PAUL LEE, for defendants in error.

Chief Justice Hill delivered the opinion of the court.

THIS case, instituted before a justice of the peace, was, upon appeal, tried to the court upon an agreed statement of facts. The judgment was against the plaintiff in error bank, who, upon a traverse of its answer to a garnishee summons, was held to be the debtor of Peter Balmer against whom the defendant in error had a judgment. The agreed record on error discloses, that on June 4th, 1915, Balmer was a farm tenant of one Signor, at which time they gave a joint note to the plaintiff in error for $1,300.00 due December 4th, following, securing it by a chattel mortgage on certain stock, machinery and crops then growing on the Signor place; that on November the 4th, 1915, Balmer and Signor executed to plaintiff in error another note for $340.00 due November 20th, same year, and secured it by chattel mortgage on that portion of the same property not then disposed of; that on December the 27th, following, Balmer turned over to plaintiff in error bank the stock and machinery covered by the mortgages; that on January 6, 1916, the bank sold it at public sale for the sum of $1,007.00 net. The testimony of Nelson, the bank's cashier, is to the effect that after crediting all amounts received from Balmer, he was still indebted to the bank on the note $147.00. It is admitted that the garnishee summons was served on

Nelson immediately at the close of said public sale, the proceeds being in his possession, but that no endorsement of them had been made on the notes. What Signor's interest in the matter was, is not disclosed. As the briefs treat the debt evidenced by the notes and the property covered by the mortgages as that of Balmer alone, we shall acquiesce in this view of it. The record shows that in August, September, October, November and December, 1915, Balmer sold to one Ogden $639.25 worth of oats and potatoes, which were covered by the first mortgage, and what was remaining when it was executed by the second; that he received in payment for these sales nine checks for $549.74; that the balance, $89.51, was used in the purchase of sacks, coal and the rent of sacks; that all of these checks but four, for a total of $94.73, went through plaintiff in error's bank; that in one of them for $108.90 the bank's name was inserted as one of the payees; that a sugar company gave checks for beets covered by these mortgages as follows: One for $431.45 payable to the bank, Balmer and Signor; one for beet seed for $150.00 (the payee in this check is not shown by the record); one to W. H. Barnes for $13.41; one to M. C. Andrews of $119.77, and one to the bank, Balmer and Signor for $93.90, two others to the parties last named for $838.39. Balmer testified that none of the $431.45 check went to the bank to pay off his notes, but that he was given permission to use this money to pay for hauling of beets and pay the help, protecting the bank's interest in the crops; that he was not clear as to the amounts paid out but testified to items as follows: beet hauling $75.00, threshing $116.00, cutting grain $40.00, for labor $93.90; that he paid $45.00 to a man in Ault on an old debt of his; $25.00 to Barnes for a cultivator; $15.00 for a hog and $45.00 to an implement company; that he fed most of the wheat and alfalfa covered by the mortgages to his hogs; that he had given the bank a rough estimate of the amounts paid out; that so far as he knew the bank had no knowledge that the funds were being used for other purposes than to save crops, except that he told Nelson of

purchasing cultivator from Barnes and feeding some of the wheat and alfalfa to his hogs. Nelson admitted that he gave Balmer permission to use some of the money but stated that it was for the sole purpose of harvesting the crops, that he had never asked him for payment of any settlement.

The record shows, that early in December, 1915, and before the bank took possession of the property it sold, a bank at Severance had secured a judgment against Balmer and garnisheed the sugar company; that the plaintiff in error bank paid $178.00 of the money received by it from the sales of these crops to the Severance bank in satisfaction of this judgment; that this payment was with the consent of Balmer; that the advertisement of the public sale of the property was signed by the auctioneer but included the language "First National Bank of Fort Collins, mortgagee"; that at the time of the service of the garnishee summons upon Nelson as cashier of the bank, the only credit endorsed on the notes was one for $414.98 bearing date December the 23rd, 1915. The judgment was against the bank for $270.89 being the amount of the Balmer judgment in favor of the defendant in error. The position of the trial court was that the public sale of the remainder of the property not theretofore sold by Balmer, was under the purported chattel mortgages by consent of Balmer, and not under any agreement between him and the bank by which he turned it over to them as security for the debt, or otherwise, than a surrender of possession under the purported mortgages; that, upon account of the acts of Balmer and the bank, pertaining to the mortgaged property, its disposition, etc., the mortgages were void as against the attaching creditors of Balmer.

The contention of the plaintiff in error that the property was turned over to the bank by Balmer, under an agreement outside of the mortgages, that the bank was to receive it as security for its debt, have it sold and apply the proceeds thereon,—is not sustained by the record. While the agreed statement of facts is not very clear on

several things, the deductions to be gathered from it on this are, that the bank took possession with the consent of Balmer, under its purported chattel mortgages, and that it was purporting to sell the property thereunder, otherwise why insert in the sale notice the words "First National Bank of Fort Collins, mortgagee." The record is silent as to any express declarations concerning such an agreement. If it had been made, it should have been inserted in the agreed statement of facts by appropriate language and not left uncertain to be urged by deductions. If such agreement could not be secured, then the testimony concerning it should have been produced and set forth in the record. This was not attempted. From the record before us, we are of opinion that there was no error in the ruling as made on this subject.

The record contains sufficient to sustain findings, that Balmer gave to the bank two notes for $1,640.00 and interest and chattel mortgages to secure each on his stock, equipment, farming implements and crops; that thereafter and during what is termed the life of the mortgages, it allowed Balmer to sell about $2,286.00 worth of crops covered by the mortgages and apply the proceeds to his own use, except $431.45, which the bank credited upon the notes; that checks for about $1,400.00 received from the sales of these crops, included the name of the bank as one of the payees; that checks for an additional sum of about $300.00 payable to Balmer received from the sale of these crops also passed through the plaintiff in error's bank; that the bank knowingly permitted Balmer to otherwise appropriate the most of the wheat and alfalfa crops covered by the mortgages. In such circumstances, we cannot agree with the contention of plaintiff in error that there is no testimony to sustain the findings of the trial court; that the action of the parties to the mortgages constitute a fraud against the right of the judgment creditors of Balmer. The defendant in error was entitled to its judgment as rendered. It had an execution or attachment outstanding against Balmer at the time of the sale. It

was looking for something to levy upon. The bank had all his property covered by the two chattel mortgages, and it was not only allowing him to sell part of it and convert the proceeds to his own use, thereby preventing his other creditors from collecting their claims, but was aiding him in such transaction, by having or allowing the checks received therefrom to include its name as payee, by collecting, or endorsing them to him, and instead of applying the proceeds in payment of his debts secured by the mortgages, it turned the money back to him, yet keeping the remainder of the property still covered by the mortgages and it thus continued to so do up to the time it took possession of the balance of the property not in this manner theretofore disposed of.

It may be conceded, as urged by counsel, that after a mortgagee takes possession, the mortgage, although otherwise defective or for some reason invalid, is good as between the mortgagor and mortgagee, and also as against creditors of the mortgagor where the mortgagee, in good faith, takes possession before the rights of other creditors have intervened by lien or levy. We cannot agree, however, that this rule should be extended to cover cases where the acts of both mortgagor and mortgagee have been such as to unlawfully defeat the rights of other creditors of the mortgagor in the collection of their debts, or in securing liens upon his property as an aid to their collection, thereby perpetrating a fraud against them. In such cases, the authorities are to the effect that the mortgage is void as against such creditors, and that the taking of possession by the mortgagee, under such circumstances, does not change this rule.

Wilson v. Voight, 9 Colo. 614, 13 Pac. 726; *Livingston v. Dry Goods Co.,* 12 Colo. App. 331, 56 Pac. 355; *Brasher v. Christophe,* 10 Colo. 284, 15 Pac. 403; *Durr v. Wildish,* 108 Wis. 401, 84 N. W. 437; *Andrews v. Partee,* 79 Miss. 80, 29 So. 788; *Putnam v. Osgood,* 51 N. H. 192; *Robbins v. Parker,* 3 Metc. 117, 44 Mass. 117.

In the circumstances of this case, as between these creditors of Balmer, so far as the remainder of the property covered by these mortgages or the proceeds derived from the sale thereof are concerned, equity and good conscience require that the mortgage debt should be treated as having been previously satisfied out of the proceeds received from the prior sales of the other property covered by the mortgages, or at least that they be held inferior, so far as any lien thereon is concerned, to that claimed by the other attaching judgment creditor.

The judgment is affirmed.

Affirmed.

Decision *en banc.*

Justices White, Garrigues and Bailey dissent.

No. 8998.

LEE *v.* GUNBY.

1. APPEAL AND ERROR—*Finding upon Conflicting Evidence*, sufficient to support it, will not be disturbed.
2. —— *Harmless Error.* The admission or exclusion of cumulative evidence, of a character, not necessarily requiring a finding at variance with the result reached below is harmless.

Error to Morgan District Court, Hon. H. S. Class, Judge.

Messrs. JOHNSON & ROBISON, Mr. RAY E. LEE, for plaintiff in error.

Mr. FLOYD E. PENDELL, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS was a suit by plaintiff, Lee, to recover $500.00 and interest, claimed to be due from defendant, Gunby, because the latter stopped payment on a check drawn by him for that amount to plaintiff. The case was tried to the court with general findings for defendant, with a judgment of dismissal. Lee brings the case here for review on error.

The facts are in substance that Lee was negotiating an exchange of his equity in certain land with one Hayden,

for the equity of Hayden in other real property. They had placed with Gunby, a real estate broker, who held a mortgage on the Hayden land, two checks, one by Lee for $1,000.00, and the other by Hayden for $500.00. The checks were drawn to the order of Gunby, with the understanding that if the deal was completed the amount so deposited was to be placed to the credit of Hayden upon the mortgage debt which the latter owed Gunby. It is claimed by Lee that these checks were not to be deposited for collection, unless and until the exchange of land was consummated, and then only upon the joint order of himself and Hayden. Gundy claims that he was to use the checks upon notification of either of the parties that the deal was closed. Gunby was notified by Hayden that the trade had been made, and he accordingly deposited the checks for collection. Afterward, but before the checks were paid in regular course, Lee notified Gunby that the deal had been abandoned. Thereupon Gunby gave Lee a check for $1,500.00 but later took back this check and gave in exchange one for $500.00. Lee stopped payment on his original check for $1,000.00, and Hayden stopped payment on his for $500.00. Gunby then stopped payment on the check for $500.00 which he had given Lee, who thereupon began this suit, to recover that sum with interest.

It is claimed that the Hayden check for $500.00, deposited in escrow, was in reality money belonging to Lee, and that Gunby knew this fact, and held it as a trustee for Lee. Gunby contends that the entire transaction between himself and Lee was simply a convenient way to make settlement between the parties, after the proposed trade between Lee and Hayden had fallen through, and that the check involved was given without consideration. Lee sets up the return of the check for $1,500.00 by him to defendant as a consideration for the $500.00 check given to him by Gunby.

The questions involved are all of fact, and were in dispute. The findings of the court are in substance that the check sued upon was accepted with full knowledge that the pay-

ment of it was contingent upon the payment of the Hayden check; that plaintiff knew of, and acquiesced in, all the proceedings leading up to the receipt of this check by himself; and that such check was without consideration.

The conclusion reached by the trial court is based upon and supported by the testimony adduced. Much of it, especially as to the controlling points, was in direct conflict, and the court resolved the issues in favor of Gunby. There is nothing in the record, either of law or fact, which necessitates a different conclusion. It is well settled that upon conflicting testimony a judgment will not be disturbed if there is sufficient evidence to support it. *Copeland v. Kilpatrick,* 38 Colo. 208, 88 Pac. 472; *Wadsworth Ditch Co. v. Brown,* 39 Colo. 57, 88 Pac. 1060; *Downing v. Ernst,* 40 Colo. 142, 92 Pac. 230; *Almosa Creek Canal Co. v. Nelson,* 42 Colo. 139, 93 Pac. 1112; *Petterson v. Payne,* 43 Colo. 184; 95 Pac. 301; *Farral v. Garfield Co.,* 49 Colo. 165, 111 Pac. 839; *White v. Nuckolls,* 49 Colo. 176, 112 Pac. 329; *German Co. v. Herbertson,* 49 Colo. 217, 112 Pac. 690, and *Denver Co. v. Young,* 49 Colo. 500, 113 Pac. 499.

Certain testimony offered by Lee was excluded, and certain other testimony offered by Gunby was admitted over objection by Lee. Both of these rulings are assigned as error. The court, however, fully understood the nature of the testimony so rejected and received. Both that so received and that rejected was cumulative, and not of a character to necessarily require different findings, so that the rulings, even if erroneous, were not in any event prejudicial.

The findings of the trial court are supported by sufficient competent, pertinent and credible testimony, and there appears to be no error in the record. Furthermore, we have critically examined the whole record, including the testimony offered by plaintiff, Lee, which the court excluded, and are firmly convinced that Gunby had no actual interest in the transaction, but acted merely as a depositary; and that he should not be saddled with any liability

whatsoever in the matter. The judgment rendered meets out evenhanded justice, and should be affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9102.

SCOTT *v.* THE PEOPLE.

1. BAIL—*Surrender of Principal.* Bail who surrenders his principal before final judgment upon *sci. fa.* is exonerated (Rev. Stat. sec. 1948).

2. JUDGMENT—*What Is—Record Construed.* Action upon a bail bond. Issues found for The People, and "ten days given in which to file a motion for a new trial. The entry of judgment stayed during that time." *Held* not a judgment, and that upon surrender of the principal by the bail, and payment of the costs in the criminal prosecution, as well as in the civil action on the bond the surety was exonerated.

Error to Yuma District Court, Hon. Haslett P. Burke, Judge.

Mr. JOHN T. BOTTOM, for plaintiff in error.

Mr. JO. A. FOWLER, Mr. ROBERT M. WORK, District Attorney, for The People.

Opinion by Mr. Justice Allen.

THIS is an action wherein the plaintiff in error is sued as surety upon a bail bond. Upon trial the court found the issues of law and of fact for the plaintiff and against the defendant. The plaintiff in error, defendant below, duly filed his motion for new trial. Before the motion for a new trial was disposed of, and at the hearing thereon, the defendant showed to the court that he had surrendered the principal to the sheriff, and had paid the costs which had accrued in the criminal action in which the bail bond had been given, and also the costs in this action. The facts thus shown were admitted by plaintiff.

It is now contended by plaintiff in error that the trial court erred in failing to dismiss the action after the showing, above mentioned, was made.

The plaintiff in error was entitled to be discharged from liability upon the bail bond if he surrendered the principal, who was the defendant in the criminal case, before judgment was rendered in this action. *Huston v. People,* 12 Colo. App. 271, 55 Pac. 262.. The defendant in error, however, insists that at the time of the surrender of the principal, the judgment in this action *had been* rendered.

At the time the principal was surrendered by the surety, in the instant case, no judgment had been entered against the surety. The record shows that at the conclusion of the trial of this case, the trial judge employed the following language:

"At this time the court finds generally the issues of law and fact in this case for the plaintiff and orders that judgment be entered against the defendant on the bond in question in the sum of one thousand dollars, with interest thereon from the 9th day of October, 1912, and for costs. Let the record show the exception of the defendant to the findings and order for judgment and the judgment to be entered thereon. Ten days given in which to file a motion for a new trial. The entry of judgment will be stayed during that time. If a motion be filed, entry of judgment will be further stayed until the final disposition of the motion for a new trial."

The foregoing did not amount to a rendition of a judgment, but was merely the announcement of the decision of the court. The term "judgment" as used in the statute, Sec. 2075 Mills Ann. Sts. 1912, Sec. 1948 R. S. 1908, relieving sureties upon the surrender of the principal, means a judgment as ordinarily defined, and as defined in Sec. 221, Mills Ann. Code, "the final determination of the rights of the parties in the action." Such final determination, according to the record in this case, would not take place until after the motion for a new trial was disposed of. Prior to that time there was no judgment either rendered or en-

tered. The court merely found the issues of law and of fact in favor of the plaintiff. The findings of a court do not constitute a judgment. *McKnight v. Balliff*, 45 Colo. 138, 100 Pac. 433.

The trial court therefore erred in assuming that it had rendered a judgment before the principal was surrendered by the surety, and in failing to dismiss the case upon the showing made by the surety, prior to November 1, 1916 when the court ordered judgment entered in favor of plaintiff, that he had surrendered the principal and paid the costs in the criminal case and in the case at bar.

The judgment is reversed and the cause remanded with directions to dismiss the action.

Reversed and remanded.

Decision *en banc.*

No. 9241.

KING *v.* THE PEOPLE.

WITNESS—*Impeachment.* The impeachment of a witness by contradiction must be upon matter material to that in issue. Information for the larceny of live stock. The prosecution were permitted to examine the accused as to an admission of a similar crime committed more than a year previous to the date in the information, and to contradict his denial of the admission. Held prejudicial error.

Error to Prowers District Court, Hon. A. Watson McHendrie, Judge.

Messrs. GORDON & GORDON, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, and Mr. J. W. KELLEY, for The People.

Mr. Justice Garrigues delivered the opinion of the court.

Defendant KING was convicted in the District Court of Prowers county under an information charging him with the larceny of livestock, the transaction occurring, according to the people's evidence, November 23, 1916, and he brings the case here for review.

The only assignment of error necessary to be considered relates to the attempted impeachment of defendant as a witness in his own behalf, on a matter immaterial to the issue on trial. Defendant when on the witness stand denied in chief, that he had taken any part in butchering the animal in question, but testified that he had assisted in butchering a hog. He was then asked: "Did you at any time butcher any beef?", to which he replied: "No, sir, I didn't." On his cross examination, the following occurred:

"Q. How long has it been now, since you have had any range beef around your place? A. I never have had any.

Q. State whether or not, sometime in September, 1915, at your house, Miss Effie O'Dell came over there about dusk and if the following conversation in substance didn't take place between you and her: Miss O'Dell came in and you had just brought in either the whole or a part of the carcass of a beef which had been butchered, and you asked her if she could keep a secret, and she replied that she could. She then asked you where you had gotten the beef, and you said you had butchered a calf and asked her if she would like to have some of it, and she asked you whose it was, and you said that it was House's and she replied, no thank you, I don't eat stolen meat. And she then asked you how it came that you had killed it, and you said, oh, we were coming across the prairie and just shot it."

Objection and exception.

"Q. Did you have substantially that conversation with Miss O'Dell? A. No sir, I didn't.

Q. And you didn't have any beef in your house at that time? A. No, sir."

In rebuttal, for the purpose of impeachment, the State called Miss O'Dell as a witness, who was permitted to testify over defendant's objection, that she had had such a conversation with him, and that she saw part of a carcass of fresh beef at his house at that time.

1. The only theory upon which this evidence of the witness O'Dell was admissible was, that it tended to impeach the defendant as a witness. It is fundamental that the impeachment of a witness must be upon a matter material to the issue on trial.

Rose v. Otis, 18 Colo. 59, 31 Pac. 493; *Denver Co. v. Owens,* 20 Colo. 107, 36 Pac. 848; *Mullin v. McKim,* 22 Colo. 468, 45 Pac. 416; *Askew v. People,* 23 Colo. 446, 48 Pac. 524; *Mitsunaga v. People,* 54 Colo. 108, 129 Pac. 241.

The issue was: Did defendant King, in the county of Prowers, State of Colorado, on or about November 23, 1916, unlawfully and feloniously steal a meat animal, the property of House. Whether defendant killed an animal or had stolen meat in his possession in September, 1915, more than a year prior to the transaction upon which he was being tried, and a matter in no way connected with the case on trial, could certainly have nothing to do with this issue. Such evidence was wholly incompetent for the purpose of impeachment and upon objection should have been excluded.

We cannot say that this testimony, introduced under the guise of impeachment, to the effect that defendant had, long prior to the transaction under investigation, been guilty of the larceny of livestock, did not prejudice his case before the jury, and the judgment of the lower court will be reversed and the cause remanded.

Judgment reversed.

Decision *en banc.*

No. 9367.

PROVIDENT LOAN SOCIETY *v.* CITY AND COUNTY OF DENVER.

1. PAWN BROKER—*Who Is—Statute Construed.* By c. 66 of the Laws of 1897 (Rev. Stat. sec. 4811) the state assumes to regulate the business of pawn broking, only where those conducting it exact as much as three per cent per month interest.
2. —— *Municipal Ordinance.* A municipal ordinance may require a license from those lending money at a rate of interest less than that set down in the statute (Rev. Stat. sec. 4811).

3. POLICE POWER—*Exercised by Municipal Corporation.* That the state has, in the exercise of the police power, prescribed regulations for those of particular callings, does not prohibit a municipal corporation from prescribing additional regulations for the same class, not in conflict with those of the state, and not in themselves unreasonable or discriminatory. Examples cited.

Error to Denver County Court, Hon. Ira C. Rothgerber, Judge.

Messrs. SYMES & FARRAR, Mr. IVOR O. WINGREN, for plaintiff in error.

Mr. JAMES A. MARSH, Mr. JACOB J. LIEBERMAN, for defendant in error.

Opinion by Mr. Justice Allen.

THIS is an action wherein The Provident Loan Society, a corporation, is charged with a violation of section 1390, article I, chapter 35, of the Municipal Code of 1906, of the City and County of Denver, which section reads as follows:

"Sec. 1390. *License Required.* It shall be unlawful for any person, firm or corporation to establish or conduct the business of pawnbroker unless such person, firm or corporation shall have first procured a license to conduct such business, in manner and form as in this ordinance provided. Every person or corporation engaged in the business of receiving property in pledge, or as security for money or other thing advanced to the pawner or pledger, shall be held and is hereby declared and defined to be a pawnbroker."

It is conceded that the Loan Society, above named, is and was a pawnbroker as defined by the ordinance, and that, as charged, it violated the ordinance by conducting the business of a pawnbroker, without having first procured a license from the city.

This action was instituted in the Municipal Court, where the defendant Loan Society was tried and found guilty as charged. An appeal was taken to the County Court, where, upon trial, a like result was reached, and a judgment was

rendered in favor of the plaintiff below, the City and County of Denver. The Loan Society, defendant below, brings the case here for review and asks that the writ of error herein be made a supersedeas. The various assignments of error are all made or based upon the theory that the ordinance in question is invalid.

It is contended by the Loan Society, the plaintiff in error, that the ordinance is in conflict with the statute on pawnbrokers (Chapter 66, p. 250, Session Laws 1897). This is the principal question presented for our determination.

The first section of the statute provides that

"* * * it shall be unlawful for any corporation, company or person to establish or conduct the business of pawnbroker within the State of Colorado, unless such corporation, company or person shall have first procured a license from the proper authorities of the town or city in which they are engaged in such business," and shall furnish a bond. (Sec. 4804, R. S. 1908; Sec. 5393 Mills Ann. Sts. 1912.)

The eighth section of the act provides, in substance, that no pawnbroker shall charge a greater rate of interest upon money advanced than that of 3% per month.

(Sec. 4811 R. S. 1908; Sec. 5400 Mills Ann. Sts. 1912.)

Section 16 of the pawnbroker statute provides that,

"Any person or persons loaning money on personal property and charging as much as the maximum rate of interest herein provided, shall be deemed a pawnbroker, and such person doing business without a license shall be guilty of a misdemeanor. * * *"

(Sec. 4819 R. S. 1908; Sec. 5408 Mills Ann. Sts. 1912.)

The plaintiff in error refers to numerous sections of the statute and of the ordinance, and contends that there is "a sharp conflict" between the provisions of the statute and those of the ordinance. The section of the ordinance under which the plaintiff in error was prosecuted, is complete within itself even when the other sections of the ordinance which relate to the rate of interest to be charged by a pawn-

broker, and to the time and manner of sale of a pledge, are deemed to be stricken out. The ordinance, therefore, even if invalid as to certain parts, may still be valid so far as its licensing provisions are concerned. *Vinsonhaler v. People*, 48 Colo. 79, 81, 108 Pac. 993. We need not, therefore, consider or examine any other part of the ordinance than the section under which this action was brought, namely, section 1390 of the Municipal Code, hereinbefore quoted.

The plaintiff in error claims that this section of the Municipal Code is in conflict with the statute because "the statute defines a pawnbroker as one making loans * * * who charges as much as 3% per month interest," while "the ordinance declares every one who engages in the business of receiving property in pledge or as security for money or other thing advanced * * * a pawnbroker, regardless of the rate of interest charged."

It is apparent from a comparison of the ordinance with the statute, that a person, firm, or corporation may be a "pawnbroker," within the definition given by the ordinance, and yet, because not "charging as much as the maximum rate of interest," not be a pawnbroker within the meaning of the statute. The plaintiff in error, according to the evidence, charges interest on its loans at a rate not exceeding 2% per month of the amount of money actually loaned or advanced. Since the Loan Society did not charge as much as the maximum rate of interest, or 3% per month, it was not a "pawnbroker" within the meaning of the statute, but was a pawnbroker as defined by the ordinance. The statute, however, did not prevent the Loan Society from being deemed, or being in fact, a pawnbroker.

When the statute designates who "shall be deemed to be a pawnbroker" it merely refers to the class of pawnbrokers who are affected by the statute, or to the class of persons who are to be dealt with by the statute as pawnbrokers. Other pawnbrokers are in no way affected by the statute. The definition given by the statute is not made a general

rule of law. It applies no further than to the statute itself. The result is that by this and other sections of the pawnbroker statute, the state exercises the power to regulate and control the business or avocation of pawnbroking, but only where such business is conducted by pawnbrokers charging as much as 3% per month interest. The state is not attempting to regulate or control the business of pawnbroking where such business is carried on by loaning money on personal property at a rate of interest less than 3% per month. It follows that if a municipality requires a license of pawnbrokers belonging to the class last described, and by ordinance attempts to, or does, regulate and control their business, it does nothing in conflict with the statute, because there is no statute governing that part of the pawnbroking business. Neither does the municipality interfere with the state's regulation and control of the business of pawnbroking. The ordinance is neither inconsistent nor in conflict with the statute. The statute requires pawnbrokers who charge as much as 3% per month interest to be licensed; so does the ordinance, because it requires *all* pawnbrokers to be licensed. The ordinance does not exclude but does include those who are pawnbrokers under and governed by the statute.

If the statute had provided that no license should be imposed on pawnbrokers except those charging the maximum of 3% per month interest, then there might have been a conflict between the statute and the ordinance, but no such provision appears in the statute, nor can it be implied from the language thereof.

It is well settled that the mere fact that the state, in the exercise of the police power, has made certain regulations does not, however, prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. 19 R. C. L. 804, Sec. 110.

Thus, a municipal ordinance making it an offense to permit gaming in the place or house of any person is not invalid because the state had enacted a statute which prohibited such acts in public places. *Greenville v. Kemmis*, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725. An ordinance declaring it unlawful for an automobile to be driven on public streets at a greater rate of speed than six miles per hour, was held not to be in conflict with a statute prohibiting the driving of automobiles "within the thickly settled or business portion of any city at a greater speed than twelve miles per hour." *Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481. There is no difference upon principle between an ordinance enlarging a class of acts, and one enlarging a class of persons dealt with by a statute. The legislature while providing that pawnbrokers charging 3% interest per month must be licensed, did not enact any law with reference to the licensing of other pawnbrokers, nor any law prohibiting the licensing and regulation of such other pawnbrokers. Upon the principle followed in the authorities cited, there is clearly no conflict between the statute and the ordinance involved in the instant case. The ordinance is neither inconsistent with nor repugnant to the general law, and does not in the least tend to limit or to interfere with the operation of the statute.

The city has the power to legislate upon local and municipal matters. If, as contended by plaintiff in error, the business of pawnbroking is a matter of state-wide interest, this fact does not prevent such business from being also a matter of municipal interest. The preservation of the health, safety, welfare and comfort of dwellers in urban centers of population requires the enforcement of very different and usually much more stringent police regulations in such districts than are necessary in a state taken as a whole.

19 R. C. L. 798, Sec. 106. In Sec. 163, p. 861 of the volume just cited, it is said:

"The business of pawnbrokers, because of the facility it furnishes for the commission of crime and for its conceal-

ment, is one which belongs to a class where the strictest police regulation may be imposed."

And in Sec. 258 of the same work is the following:

"Among the occupations which have been held to affect the public interest so far that a municipal corporation may lawfully require a license as a condition of engaging therein are * * * keeping a * * * pawnbrokers shop."

In Sec. 1023 McQuillen Munic. Corp., it is said:

"The law recognizes that the business of a pawnbroker is of such a character as to justify and imperatively require rigid police supervision, and as a means to this end a permit or license to conduct such business may be demanded."

For the reasons hereinbefore stated, we hold that section 1390 of the Municipal Code of 1906, of the City and County of Denver, being the section of the ordinance involved in this case, is valid, and that no error was committed by the County Court in finding and determining that plaintiff in error was a pawnbroker under the ordinance and subject to the penalties provided for the violation of the section of the ordinance in question. The application for a supersedeas will therefore be denied, and the judgment affirmed.

Affirmed.

Mr. Chief Justice Hill and Mr. Justice Bailey concur.

No. 9343.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* DUFFEY.

1. COUNTY COURT—*Appeal from Justice—Bond.* To dismiss an appeal for defects in the appeal bond, without affording appellant opportunity to furnish a proper bond, is error (Rev. Stat. sec. 3853).

   This section controls even though the bond is not signed by appellant at all, but only by the surety.

2. APPEALS AND ERROR—*Judgment.* Writ of error pending on application for supersedeas. Error being manifest, the judgment was reversed, and the cause at once remanded, with directions to the court below to correct its irregularities.

Error to Lake County Court, Hon. Thomas F. O'Mahoney, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, Mr. J. W. CLARK, for plaintiff in error.

Mr. JAMES T. HOGAN, for defendant in error.

Chief Justice Hill delivered the opinion of the court.

THIS action was instituted by the defendant in error before a Justice of the Peace. Upon appeal to the County Court he moved to dismiss the appeal for the reason that no appeal bond had been given, the purported bond filed and approved not being signed by the defendant, but by its surety only. This motion was granted and the action dismissed without giving the defendant an opportunity to furnish a good bond.

In this the trial court erred. In such cases, section 3853 Rev. Stats., 1908, gives to the defendant a reasonable time within which to file a good and sufficient bond.

Schofield v. Felt, 10 Colo. 146, 14 Pac. 128.

The contention because the bond was not signed by the defendant, that it was no bond, hence section 3853, *supra,* does not apply, is not well taken.

Wheeler v. Kuhn, 9 Colo. 196, 11 Pac. 97.

While this case is now being presented on application for supersedeas only, it is controlled by former cases involving the same points which are not now debatable in this jurisdiction, for this reason we are of opinion that it should be finally disposed of at this time.

The judgment will be reversed and the cause remanded with directions to vacate the order of dismissal and give to the defendant a reasonable time within which to execute and have approved an appeal bond.

Reversed and remanded with directions.

Mr. Justice White and Mr. Justice Teller concur.

No. 8990

FIRST NATIONAL BANK OF FORT COLLINS v. DANIELS MERCANTILE COMPANY.

Judgment affirmed, on the authority of *First National Bank of Fort Collins v. Shafer et al., ante.*

Error to Weld County Court, Hon. Herbert M. Baker, Judge.

Messrs. LEE & SHAW, for plaintiff in error.

Mr. JOHN PAUL LEE, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

This action was tried with No. 8989, *The First National Bank of Fort Collins*, plaintiff in error, *v. John E. Shafer and Bert A. Shafer*, doing business as *The Shafer Hardware Company*, defendants in error. The same state of facts applies to both. The opinion in the other case controls this and justifies an affirmance of the judgment, which is ordered.

Affirmed.

Decision *en banc.*

Justices White, Garrigues and Bailey dissent.

No. 8861

LEVY CONSTRUCTION COMPANY v. TEMPLETON.

Judgment affirmed, on the authority of *Levy Company v. McGonagle*, No. 8863, Col., 170 Pac. 1183.

Error to Moffat District Court, Hon. John T. Shumate, Judge.

Mr. FRANK MCLAUGHLIN and Mr. WALTER M. APPEL, for plaintiff in error.

Per Curiam.

This case was consolidated and tried with the case of *Levy Construction Co. et al. v. McGonagle*, No. 8863, decided at this term of court and upon the authority of that case the judgment is affirmed.

Judgment affirmed.

Per Curiam:

No. 9337.

MUHLSTEIN v. CROKE.

Error to Adams County Court, Hon. W. C. Hood, Jr., Judge.

Judgment affirmed.

Mr. CARL H. COCHRAN, for plaintiff in error.

Mr. HARRY BEHM, for defendant in error.

Per Curiam:

This matter comes before the court on an application for a supersedeas. An examination of the records and briefs clearly discloses no error before the trial court, and for such reasons the application for supersedeas is denied and the judgment affirmed.

In Department. *Per Curiam.*

No. 8862.

LEVY CONSTRUCTION COMPANY *v.* MCKINNON.

Error to Moffat District Court, Hon. John T. Shumate, Judge.

Mr. FRANK MCLAUGHLIN and Mr. WALTER M. APPEL, for plaintiff in error.

Per Curiam:

This case was consolidated and tried with the case of *The Levy Construction Co. et al. v. McGonagle*, No. 8863, decided at this term of court, and upon the authority of that case, the judgment is affirmed.

Judgment affirmed.

Per Curiam.

April Term, 1918

No. 8911.

HARVEY ET AL. *v.* BEARD.

1. NEW TRIAL—*Attempted Bribery of a Juror*, by the defeated party, is no ground for a new trial.
2. —— *Conclusions of the Court Below*, upon any allegation of misconduct on the part of the jurors, or of any other person, with the jurors, are entitled to the same consideration as its conclusions upon any other question.

Error to Denver District Court, Hon. A. Watson McHendrie, Judge.

Department.

Mr. JOHN A. DEWEESE, Mr. ISHAM R. HOWZE, for plaintiffs in error.

Mr. JAMES J. MCFEELY, Mr. M. B. WALDRON, for defendant in error.

Opinion by Mr. Justice Teller.

Defendant in error recovered a judgment against plaintiffs in error in an action for malicious prosecution.

Errors are assigned on the giving and on the refusing of instructions, but it appears from the statement of the trial court, in overruling a motion for a new trial, that these errors were not argued on the hearing of said motion. The error argued then, and the only one seriously urged and discussed in the brief, is the denial of a new trial, a right to which was claimed on the ground that an attempt had been made to bribe a juror.

It appears that the foreman of the jury reported to the court that one of the jurors had disclosed the fact that he had been approached and offered a bribe to hang the jury. This report was made a short time before the jury agreed

upon a verdict for the plaintiff. The court ordered an investigation to be made, heard the testimony of said juror, of counsel on both sides, and of several other persons. The juror testified that a man came to his house in the evening, and said to him "there is fifty in it if you can hang the jury, for we don't want that kid to have anything." The man told the juror his name, and it appeared by the testimony of others that he had been in court on that day, and had been seen and heard in conversation with counsel for the defendants in that action. A citation was issued for the man, but he was not found, and never appeared during the investigation. The foreman of the jury stated in the presence of the other jurors that they were agreed that the incident had not influenced them to any extent whatever.

The court found that the verdict had not been affected by the attempted bribery, that it had been made in the interest of the defendants,—the unsuccessful party,—and that it was not ground for a new trial.

This court is committed to the doctrine that upon a question of misconduct by jurors, or of other persons with relation to jurors, the findings of the trial court are entitled to the same consideration as on other questions; and, unless it is manifest that the court came to a wrong conclusion, the findings will not be disturbed: *Laintz v. Denver Tramway Co.*, 54 Colo. 371, 131 Pac. 258; *Florence Co. v. Kerr*, 59 Colo. 539, 151 Pac. 439.

There is an abundance of evidence to support the court's findings.

The denial of the motion for a new trial on the ground above stated was right in another view of the matter. The attempt to corrupt the jury was clearly made on behalf of the defendants, the plaintiffs in error here, and, that being so, the authorities cited in support of a reversal do not apply. The true rule is laid down in *Hutchinson v. Consumers Coal Co.*, 36 N. J. L. 24-29, where it is said:

"Where both parties are innocent, a tainted verdict will in general be set aside without hesitation on the application

of either party; but the same principle of public policy which requires us to set aside the verdict in such a case imperatively forbids us doing it on the application of one who has attempted directly or indirectly to influence the jury by improper means, or who has encouraged or prompted or knowingly permitted such an attempt, or even rests under any just suspicion of having done it."

As the trial court pointed out, it would be a dangerous precedent to establish that a litigant, apprehensive of losing his case, might attempt to bribe a juror, and make that a ground for a new trial, if he were defeated in the action.

The judgment is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

Decided February 4, A. D. 1918. Rehearing denied May 6, A. D. 1918.

No. 8999.

DOURTE v. SHIREY.

APPEAL AND ERROR—*Failure to Reserve Exceptions* to instructions given, to the denial of the motion for new trial, and to the judgment, precludes a review upon the evidence.

Error to Denver County Court, Hon. Herbert M. Baker, Judge.

Mr. WILLIAM A. COOK, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Garrigues delivered the opinion of the Court.

THIS was an action by Shirey as plaintiff, to recover judgment against defendant Dourte, on a promissory note.

Error is assigned upon the giving of certain instructions by the court; also on the point that the judgment is contrary to, and not supported by the evidence, and that the court erred in overruling the motion for a new trial.

We have carefully examined what is denominated the "Abstract of Record and Synopsis of the Evidence," which

the trial judge certifies: "Contains sufficient of the evidence, rulings, orders, instructions, objections and exceptions at the trial, necessary or essential to the proper consideration of the errors assigned," and we find that it fails to show that a single exception was reserved to the giving of instructions, to the action of the court in overruling the motion for a new trial, or to the judgment.

In these circumstances, we are precluded from reviewing the case on the evidence.

McPhail v. City & County of Denver, 163 Pac. 861; — Colo. —; *Manzoli v. People*, 169 Pac. 144, — Colo. —.

The judgment of the lower court is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9041.

HENRYLYN IRRIGATION DISTRICT *v.* THOMAS.

IRRIGATION DISTRICT—*Default in Interest—Remedy.* Under the provisions of secs. 3456 and 3459 of the Revised Statutes, the sole remedy of the holder of the bonds of an irrigation district, if default be made in the payment of interest, is by mandamus. An ordinary action demanding judgment for money will not lie. *Rio Grande Junction Co. v. The Orchard Mesa District*, 64 Colo., followed.

Error to Denver District Court, Hon. Granby Hillyer, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiff in error.

Messrs. THOMAS & THOMAS, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

The defendant in error brought this action to, and did, obtain a money judgment against the plaintiff in error (an irrigation district) upon certain of its unpaid interest coupons. The district brings the case here for review, and contends that the statute provides the only method to the

holder of such coupons for enforcing their payment, which does not include the line of procedure attempted to be followed.

Irrigation districts are organized for the purpose of carrying out certain special improvements. Section 3456, R. S., 1908, provides that the interest on coupons shall be paid by revenue derived from an annual assessment upon the real property of the district, and, that the real property of the district shall be and remain liable to be assessed for such payment *as therein provided.* Section 3459, R. S., provides that all taxes levied under the irrigation district are special taxes. The act provides when and for what amounts the lands in the district shall be assessed for the payment of the interest coupons which, upon account of each acre receiving an equal benefit by virtue of the improvement, is upon a flat basis, that is an equal amount per acre, regardless of the difference in the value of the land. The rule of construction applicable to legislative acts (with certain exceptions, of course) is that the inclusion of one method intended to cover or take care of something, is the exclusion of all others, the same as though the act had thus stated.

City of Golden v. Western L. & P. Co., 60 Colo. 382, 154 Pac. 95; *Board of Co. Com'rs. v. Wheeler*, 39 Colo. 207; 89 Pac. 50; *In Re Senate Resolution No.* 10, 33 Colo. 307, 79 Pac. 1009; *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403; Pomeroy Municipal Law (2nd Ed.), Sec. 916.

There is nothing in this act pertaining to the payment of interest coupons, which calls for any exception to the rule of construction recognized by the authorities above referred to, for which reason we agree with the plaintiff in error, that its language means just what it says, and furnishes the measure of the contract between the district and its coupon holders. If this method was not followed, the remedy is by mandamus to compel those whose duty it was, to do so; their neglect in this respect does not justify an ordinary suit for a money judgment. This phase of the case was gone into in detail in *Rio Grande Junction Ry. Co.*

v. Orchard Mesa Irrigation District, 64 Colo. —, 171 Pac. 367, where our cases on this subject are collected and commented upon.

The judgment will be reversed and the cause remanded with directions to dismiss the action.

Reversed.

Mr. Justice Bailey and Mr. Justice Allen concur.

No. 9043.

SUTTON, STEELE AND STEELE MANUFACTURING, MILLING & MINING COMPANY *v.* MCCULLOUGH.

1. GUARANTY—*Construction.* The liability of a grantor is limited, the words of its contract strictly construed.

   By an agreement between plaintiff, two mining companies, and a trustee, it was provided that plaintiff should organize a new mining company that the two mining companies, parties to the agreement, should convey to the new corporation "a satisfactory merchantable title" to certain mining properties and that plaintiff, after the formation of the new company, "and good title to said properties conveyed to it", would provide for the new company a specified sum for the equipment of a mill. In the same connection defendants entered into an agreement with plaintiff reciting that in consideration of the advances to be made by the plaintiff to the new company "during the period required for an examination of the titles, etc. . . . in the event said titles are not found merchantable and good", to repay to plaintiff the moneys by it advanced on account of the new company. *Held* that defendant's agreement was not a guaranty that the title conveyed to the new corporation should be satisfactory to the plaintiff, and that to charge the guarantors, it must appear that the titles in question were, in fact, not merchantable and good.

2. CONVEYANCE OF LANDS—*Construction.* A general description of the premises conveyed prevails over a particular description when this is the clear intent.

   A conveyance containing a particular description was followed by a clause in these words, "also all real estate of said corporation acquired and which may be acquired in said county, whether particularly described herein, or otherwise". *Held* to pass an interest in the premises mentioned, not contained in the particular description.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Messrs. ROGERS, ELLIS & JOHNSON, Mr. DANIEL B. ELLIS, Mr. PERCY ROBINSON, for plaintiff in error.

Mr. GEORGE L. NYE, Mr. A. T. MONSON, for defendants in error.

Opinion by Mr. Justice Allen.

This is an action brought by The Sutton, Steele and Steele Manufacturing, Milling and Mining Company, hereinafter called the Milling Company, against Heslop H. McCullough and H. F. Baker, hereinafter referred to as the defendants. The Milling Company seeks to recover of and from the defendants, upon a certain contract of guaranty executed by them under the circumstances and for the purposes hereinafter shown.

On August 18, 1914, and prior to the making of the contract of guaranty sued on, a contract was entered into by the Bessie Cora Mining Company and the McCullough Mines Company, as parties of the first part; George L. Nye, as trustee, party of the second part; and the above named Milling Company as party of the third part.

Under the contract last mentioned, it was agreed, among other things, that a new company or corporation would be organized by the Milling Company, and that each of the two mining companies, being the parties of the first part named in said contract, would convey to the new company by good and sufficient deeds "a satisfactory merchantable title, free and clear from any and all liens, incumbrances and taxes of every name and nature whatsoever," to certain mines and mining properties which are named and described in the contract. It was also provided in this agreement "that after the new corporation is organized, and good title to said properties has been conveyed to it, as aforesaid, the said milling company shall provide and make available for said new company as fast as needed" for the equipment of a mill, the sum of $25,000.00.

After the making of the contract above mentioned, which will be referred to as the Mining Companies' contract, and on the same day, or within the next few days, the defendants, McCullough and Baker, entered into the contract of guaranty upon which this action is brought. The contract in question recites that in consideration of the Milling Company's advancing the money for the equipment of the mill, as agreed in the Mining Companies' contract, "during the period required for an examination of the titles to said properties, and the organization of the new company," McCullough and Baker (the defendants)—

"jointly and severally personally agree and guarantee, in the event said titles are not found merchantable and good, and free from all liens, incumbrances and taxes, or said agreement and each and every part thereof is not carried out by the said The Bessie Cora Mining Company and the said The McCullough Mines Company, to repay to (the Milling Company) any and all sums of money advanced or paid out by you (the Milling Company) on account of said new company, or in connection with said agreement."

The complaint of the plaintiff, the Milling Company, sets forth the guaranty contract sued on, and also the Mining Companies' contract, and alleges the expenditure of certain sums of money by plaintiff "because of said contract of guaranty," in connection with the equipment of the mill as contemplated in the contracts herein mentioned. It is further alleged in the complaint that neither The Bessie Cora Mining Company nor The McCullough Mines Company have conveyed to the new company "a merchantable and good title to the properties mentioned in said agreement dated August 18, 1914."

The defendants, in their answer, among other things, deny all of the above mentioned allegations of the complaint, except that they admit that plaintiff advanced the amount of money alleged.

The trial court found that the evidence did not show any liability on the part of the defendants, and judgment was

rendered accordingly. The plaintiff Milling Company brings the case here for review.

The trial court's finding was based upon the theory that the defendants by their contract of guaranty did not guarantee "a satisfactory merchantable title" as the Mining Companies (not the defendants) agreed in *their* contract to convey to the new corporation, but that the defendants simply agreed to repay moneys to plaintiff only in case the titles were not "merchantable and good." This theory is assailed by the plaintiff in error, the Milling Company, and it is contended that the trial court erred in construing the defendants' contract "as not conditioned upon a satisfactory, merchantable title."

We do not agree with the contention thus made. The liability of a guarantor cannot be enlarged beyond the strict intent of the instrument. 12 R. C. L. 1075. We are of the opinion that the defendants' contract by its use of the expression, "in the event said titles are not found merchantable and good," clearly shows that it was the intent of the parties that no liability should attach to the defendants, unless the titles were in fact not "merchantable and good," and that the defendants did not guarantee that the title or titles would be "satisfactory" to the plaintiff. Our conclusion, in this respect, is reached after a due consideration of all the clauses and expressions contained in the contract. It is immaterial that the defendant's contract of guaranty, with reference to the title to the mining properties, is narrower or different than the Mining Companies' contract. A guaranty may be narrower than the contract between the principal debtor and his creditor. *Church v. Albers,* 174 Mo. 331, 342, 73 S. W. 508, 512.

The main contention of the plaintiff in error is to the effect that the trial court erred in finding from the evidence, in view of Exhibits K to P inclusive, that the title to the Chatauqua Lode, which is one of the properties named in the Mining Companies' contract, was merchantable and good.

We find from the record that the evidence shows that the title to the Chatauqua Lode, on January 31, 1879, was in The Montezuma Silver Mining Company. The contention of the plaintiff in error is based principally upon alleged defects in conveyances of the Chatauqua Lode subsequent to the date last mentioned. The first of such instruments is plaintiff's Exhibit K, a mortgage. The plaintiff in error claims that this mortgage, and also some of the later conveyances, convey only 2,100 feet of the Chatauqua Lode instead of its entire 3,000 feet. The argument deals with the description of the property conveyed. The description in the granting clause in Exhibit K is, in substance, as follows:

"Seventeen hundred feet on the Chatauqua Lode, as follows, viz: * * *

"And also four hundred feet on said Chatauqua Lode, viz: * * *

"And also all the real estate of said corporation (the grantor) acquired and which may be acquired in said Summit County, Colorado, whether the same is particularly described herein or otherwise."

The plaintiff in error relies upon authorities which follow the rule that a particular description which is clear and explicit and is a complete identification of the property intended to be conveyed will not be varied or enlarged by a more general and less definite description. However, the principal rule is, that the intention of the parties as apparent in the deed should control in determining the property conveyed thereby. 13 Cyc. 626. The general description prevails over the particular description where there is a clear intent to have the general control. 13 Cyc. 632. Such is the situation in the instant case. Preceding the general clause, which has been above quoted, is a description not only of a part of the Chatauqua Lodge, but also of 800 feet of the General Teller Lode, eight other named lodes, and other mining properties. A case in point is that of *Clifton Heights Land Co. v. Randall,* 82 Iowa 89, 47 S. W. 905, where the court said:

"The South Park Company conveyed to plaintiff by deed wherein the description of the property is given by lots, blocks or government subdivisions, covering over two pages of legal cap, followed with these words, 'Also together with all other lands that may not have been heretofore described belonging to said South Park Company.' Appellant contends that as certain lots are expressly mentioned, that excludes all others, and as Lot 22 is not mentioned, it did not pass by the deed. Such a construction of this deed would be against the manifest intent of the grantor. The evident purpose was to convey all the land owned by the grantor. * * * To cover any omissions and express the purpose of the parties, the recital quoted was added as descriptive of what further was conveyed."

The grantor, in Exhibit K, owned the entire 3,000 feet of the Chatauqua Lode, and by the conveyance there is a clear intent to have the general description control, and the same should be given effect. Exhibit K, therefore, conveyed the entire 3,000 feet of the lode in question, and the grantee received a good and merchantable title to the same.

A discussion of Exhibits L to P, inclusive, would be practically the same as the expression of our views with reference to Exhibit K. It is sufficient to say that in our opinion the plaintiff failed to show that the title to the Chatauqua Lode was not good and merchantable.

Other questions are discussed in the briefs. The same have been considered, and the conclusion reached that no error was committed by the trial court.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8434.

McPHEE ET AL. v. THE UNITED STATES.

1. PLEADING—*Technical Defects.* An allegation in a petition of intervention that principal and sureties executed bonds to United States aggregating $155,000, each surety obligating himself to the extent and in the amount set opposite his name did not affect the substantial rights of the sureties, where the petition set out a copy of the bond which showed on its face that the total obligation was $150,000.
2. BOND—*Alteration.* Where the contractor was to furnish bond for $150,000, and with the different sureties executed separate bonds, each reciting that the instrument was a part of the security in the bond of $150,000 required of the contractor, each instrument showing the limit of individual obligations of the sureties on such bond, the fact that the aggregate of such limits was $155,000 did not constitute a material alteration of the bond for the obligation of the sureties rests upon the primary obligation of the principal.
3. CONTRACT—*Abandonment.* Under contract providing that upon contractor's neglect or refusal to provide means for energetic and satisfactory compliance with the contract within the time specified in a notice, the United States could suspend the contract and take charge of and complete the work, a written waiver by the contractor of the time given in such notice served upon him, followed by his leaving the work, was a voluntary abandonment of the contract.
4. ABANDONMENT OF CONTRACT—*Notice to Surety—Completion of Work.* Where contractor waived time given him in notice to remedy matter complained of and abandoned the work, his obligee was neither required to wait until the termination of such time to take over the work nor to notify the sureties of his intention so to do.
5. PLEADINGS—*Admissions.* A party is bound by the allegations and admissions of his own pleadings, or of those of another which he adopts.
6. STIPULATIONS—*Effect.* In action on government contractor's bond a stipulation between the creditors and the sureties that the contract or has been ousted from his work by the United States without his fault, is not binding on the United States.
7. CONTRACT—*Modification—Release of Sureties.* Waiver of contractor of time specified in a notice served upon him to comply with certain requirements of the contract did not constitute a modification of the contract so as to release a surety, but was only proof that the contractor refused to proceed further.

8. BANKRUPTCY—*Debts Dischargeable—United States.* Under Bankruptcy Act (Act, Cong. July 1, 1898, Chap. 541, 30 Stat. 544), liability as a surety on a government contractor's bond to the United States is dischargeable.

9. UNITED STATES—*Bond—Separate Action—Obligees.* Under a government contractor's bond given under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, the United States and persons supplying the contractor with materials may, upon breach of the bond, maintain separate actions against the sureties.

10. PRINCIPAL AND SURETY—*Interest.* The surety on such government contractor's bond is liable for interest from the time of breach of contract.

11. —— *Discharge of Surety—Payment.* Under a government contractor's bond, where materialmen and laborers and the United States have separate rights and may maintain separate actions on the bond, payment by surety to either one discharges his obligations as to the others to the extent of the payment.

12. TRIAL—*Issues—Findings.* A finding by the court upon an issue it would not permit to be made, is error.

13. BOND—*Contractor—Supplies—Liability of Surety.* Under a bond executed under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, in which reference was made to a contract to perform work under the provisions of the "Reclamation Act" (Act June 17, 1902, Chap. 1093, 32 U. S. Stats. at Large, p. 388), the surety is liable for supplies for buildings, dining rooms, furniture, and means of provisioning workers, where the work which would take months to complete, was to be performed many miles from any town.

14. GOVERNMENT CONTRACT BOND—*Separate Action—Postponement.* A cause of action which has arisen upon a government contractor's bond given under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, in favor of persons supplying a government contractor with materials in the prosecution of work under the "Reclamation Act" (Act June 17, 1902, Chap. 1093, 32 U. S. Stat. at Large, p. 388), need not wait the outcome of a suit upon the same bond in favor of the United States.

15. UNITED STATES—*Government Contract—Bond—Obligees—Priority.* Under a government contractor's bond which gives individual creditors and the United States independent causes of action, such as a bond, Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, priorities between individual creditors and such government should be as though between man and man.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Messrs. ROGERS, ELLIS & JOHNSON, Mr. PERCY ROBINSON, Messrs. DINES, DINES & HOLME, Mr. K. B. TOWNSEND, for plaintiffs in error.

Mr. HARRY B. TEDROW, Mr. FRANK HALL, Mr. J. R. ALEXANDER, Messrs. SMITH, BROCK & FERGUSON, Mr. R. F. ARMSTRONG, Messrs. SHERMAN & SHERMAN, for defendants in error.

Mr. Justice White delivered the opinion of the court:

NOVEMBER 21, 1904, The Taylor-Moore Construction Company, a Texas corporation, hereinafter called the contractor, entered into an agreement with the United States for the construction of the Gunnison Tunnel as a part of the Uncompahgre Valley Irrigation Project in this state. The work was prosecuted under the provisions of "The Reclamation Act," 32 U. S. Stat. at Large, p. 388. The contract, by reference, included the advertisement for bids, the proposals of the contractor, and the specifications for the work, and obligated the contractor to give a bond, as required by the Act of Congress of August 13, 1894 (28 U. S. Stat. at Large, p. 278), in the sum of $150,000. Thereupon the contractor caused to be executed and presented to the Secretary of the Interior, as such bond, the instrument constituting the basis of this controversy. The instrument was unusual in form, in that it was composed of seven different writings, executed by different sets of individual sureties. Such writings constituted the completed instrument, and each recited the terms and conditions of the bond in identical language, except that the liability of each surety was designated separately, and the sum for which each became liable was less than the full $150,000 penalty designated in the bond. The following is a verbatim copy of the body of the instrument executed by sureties Leyner, Riggs, Elliott and Weigle, to-wit:

"Know All Men by These Presents, that we, The Taylor-

Moore Construction Company, a corporation duly organized under the laws of the State of Texas, and doing business in Hillsboro, County of Hill, and State of Texas, principal, in the sum of one hundred and fifty thousand dollars, and J. Geo. Leyner of the city and county of Denver, and State of Colorado, surety, in the sum of fifteen thousand dollars, and R. L. Riggs of the city and county of Denver, and State of Colorado, surety, in the sum of five thousand dollars, and Jacob J. Elliott of the city and county of Denver, and State of Colorado, surety, in the sum of five thousand dollars ($5,000), and William A. Weigele of the city and county of Denver, and State of Colorado, surety, in the sum of five thousand 00/100 dollars, are held and firmly bound unto the United States of America, each in the sum set opposite its or his respective name, lawful money of the United States, for which payment, well and truly to be made, we, each of us, bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and *Attested* by our signatures, this twenty-first day of November, in the year of our Lord, one thousand nine hundred and four.

The Nature of This Obligation Is Such that, whereas the said principal has entered into a certain contract, as hereinafter recited, and is required thereunder to furnish bond to the United States of America, in the sum of one hundred and fifty thousand dollars, this bond being a portion of the security so required. *Therefore,* if the said The Taylor-Moore Construction Company, its successors and assigns, or any of them, shall, and do, in all things, well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on the part of the said The Taylor-Moore Construction Company, its successors and assigns, are, or ought to be, observed, performed, fulfilled, accomplished and kept, comprised or mentioned in certain articles of agreement bearing date the twenty-first day of November, one thousand nine hundred and four, between the said The Taylor-Moore Construction Company and E. A. Hitchcock, Secre-

tary of the Interior, concerning the construction and completion of the Gunnison Tunnel, Uncompahgre Valley Project, Colorado, according to the true intent and meaning of said articles of agreement, and shall promptly make payment to all persons supplying their labor and materials for the prosecution of the work provided for, then the above obligation to be void, otherwise to remain in full force and virtue.

In Testimony Whereof, the said The Taylor-Moore Construction Company, as principal, and J. Geo. Leyner, R. L. Riggs, Jacob J. Elliott and William A. Weigele, as sureties, have hereunto subscribed and affixed their seals the day and year first above written."

Each of the several parts of the bond is signed by the principal and the sureties therein named. Each surety justified before a notary public, and either the postmaster or some other Federal officer certified as to his citizenship and financial ability. The several parts of the bond were introduced in evidence as Exhibit A, and therefrom it appears that the total of the sums for which sureties signed aggregated $155,000, *but in each instrument it was recited that the same was a part of the security in the bond of* $150,000 *required of the contractor.* Three of the several instruments composing the bond were executed in Texas, by sureties residing there; the remaining four were executed by sureties residing in Colorado. In December, 1904, after the execution and delivery of the contract and bond, the contractor entered upon the work, but quit the same on May 26, 1905, at which time it was taken over by the United States. At that time there were several outstanding obligations of the contractor for labor and materials furnished in the prosecution of the work, and supplies furnished the boarding house and commissary department maintained by the contractor near the scene of operation. September 11, 1905, some of such creditors instituted an action in the District Court of Montrose County upon the bond. The contractor and the sureties residing in Colorado were brought within the jurisdiction of the court, but the sureties

residing in Texas were neither served with process nor entered their appearance in the case. March 26, 1906, the United States appeared in the case, specially, and questioned the jurisdiction of the District Court, and surety Weigle thereafter raised the same question by demurrer to the complaint, which was sustained, and the action dismissed. The cause thereupon came to this court on writ of error prosecuted by the plaintiffs in the original suit. Judgment was reversed and the jurisdiction of the District Court sustained. *United States, etc., v. McPhee et al.*, 51 Colo. 425. Early in the year 1912 the United States completed the project, and on March 25th intervened in the case, and thereafter on May 10, 1913, filed its amended petition in intervention, and prayed judgment against the sureties on the bond, by reason of the default of the principal therein in the fulfillment of the aforesaid contract of construction. Prior and subsequent to the last named date, some of the defendant sureties filed joint answers to the complaint, as well as to the petition in intervention, and others filed separate answers. Demurrers were interposed to different pleadings and amended ones filed, and as late as April 1, 1914, a replication to the separate answers of certain sureties was filed by the United States. At this time the United States also presented to the court, and requested permission to file, an answer to the complaint, an answer to the petition in intervention of The Hendrie-Bolthoff Manufacturing & Supply Company, an intervening creditor, and an answer to the petition in intervention of the other intervenors, together with a replication to the answers of the plaintiffs, and certain intervenors to the amended petition in intervention of the United States. The court declined to permit the filing of these pleadings. Counsel agreed upon an order of procedure, to the effect that the questions between the United States, the plaintiffs, and intervening creditors should be deferred until after the question of the liability of the sureties on the bond was determined. Finally, except as aforesaid, all cases were at issue, presenting a three-sided controversy, in which, on

some issues, the United States and the individual creditors have identical interests, and on other issues the interest of the United States is directly opposed to that of the individual creditors.

An agreed statement of facts was entered into between the plaintiffs and the defendant sureties, by which the latter admitted the various claims of the former, but submitted to the court for determination the question of liability of the sureties on the bond. A like stipulation was made between the defendant sureties and the intervening creditors, The Hendrie-Bolthoff Manufacturing & Supply Company, and McPhee & McGinnity Company. The United States, by an instrument filed in this court, admits the same facts. The defense of the sureties was that the bond, after its execution and delivery, had been materially changed by reason of which the sureties were released from liability thereon; that the United States and the contractor, by mutual consent, modified the terms of the contract after the execution and delivery of the bond, and thereby released the sureties from liability to the United States; that the United States wrongfully ousted the contractor, and prevented him from completing the contract. Surety Orman pleaded and relied upon the additional defense of lack of consideration in the execution of the instrument signed by him, and that he had been adjudged a bankrupt, and thereafter discharged in such bankruptcy proceedings from all liability on account of the claim or undertaking sued on.

The case was tried to the court without a jury, and July 7, 1914, findings of fact were made and judgment entered, to which exceptions were saved by the United States, and all the defendant sureties, except Orman. Some of these findings and portions of the judgment which we now desire to consider may be briefly stated as follows: That because the bond recited on its face that it was taken in the sum of $150,000, and the total amount for which the several sureties bound themselves individually totaled the sum of $155,000, it constituted a material change in the bond, rendering it inoperative and void so far as the United States

is concerned, but does not affect its validity as to the creditors who furnished labor, materials and supplies to the contractor; that defendant Orman was relieved of liability on the bond by reason of his discharge as a bankrupt; that each of the several claims presented by the individual creditors was for labor and materials supplied in the prosecution of the work, within the meaning of the Act of Congress of August 13, 1894, and for the payment of which the sureties were liable, together with interest thereon from the date when the suit was filed. Upon the facts so found judgment was entered as follows: Against the United States denying it any relief; against each of the Colorado sureties, except Orman, for the full amount for which he obligated himself in the instrument forming a part of the bond, with interest thereon from the date of the commencement of the suit at 8% per annum; in favor of Orman, discharging him of all liability on the bond; in favor of the individual creditors of the contractors for the full amount of their respective claims, with interest thereon at 8% per annum from the date of the commencement of the suit, to be paid out of the fund collected from the judgment against the sureties, and thereupon such judgment against the sureties to be fully satisfied.

1. The defendant sureties criticise the complaint and the amended petition in intervention of the United States. They assert that the allegations of the different obligees under the same instrument, in respect to the construction of the instrument, are in conflict with each other, and that each of such pleadings contains within itself contradictory allegations or recitals, and that it is uncertain whether the individual creditors treat the alleged obligations of the sureties as liabilities under a bond for $150,000 or $155,000; while the United States in its petition admits that said instruments constitute a bond for $155,000. Such pleadings are subject to criticism, but are not fatally defective when properly considered. The sureties did not, in the trial court, ask the elimination of the objectionable features of the pleadings. The allegations of the complaint charge

that the contractor and sureties executed and delivered to the United States "their joint and several undertakings and bonds in the aggregate sum of $150,000, * * * each in the amount set opposite to his name as sureties," etc., the several sums so set forth aggregating $155,000, and prayed judgment against each surety for the amount for which he obligated himself on the bond. The amended petition of intervention alleges that the contractor, as principal, and each of the other defendants named as sureties, executed and delivered to the United States "their joint and several undertakings and bonds * * * in the aggregate sum of $155,000, each of said sureties entering into said undertakings and bonds to the extent, and in the amount, set opposite to their respective names," and then follows a list of the several sureties, with the amount for which each obligated himself set opposite his name, together with a copy of the bond, in which the penal sum was designated as $150,000. The bond, having been set forth, showed on its face that it was an obligation in the sum of $150,000, and the prior erroneous allegation is technical and neither misled the defendant sureties nor affected their substantial rights.

2. The contention of the sureties, and the finding of the court, that there was a material alteration in the bond after its execution and delivery, have no support in the record. The facts in relation to the entire matter are undisputed. The question involved is, therefore, one of law, not of fact. Every surety had full knowledge of the advertisement for bids, the proposal of the contractor and the specifications for the work, as they were made a part of the construction contract, and the latter instrument, by reference, was embodied in the bond. The contractor was required to "furnish bond in the sum of $150,000 for the faithful performance of the work," with "good and approved security," and each of the seven instruments recites such facts in specific terms and declares that it is "a portion of the security so required." Each surety, with full knowledge of such facts, executed one of the seven instruments

which compose this bond. While each instrument disclosed that the contractor was required to furnish to the United States a bond in the sum of $150,000, with good and sufficient security, and recited that it was to be a part of such security, it disclosed nothing relative to the nature of the other parts. The intent is clear that each surety understood and intended that he should be bound in a designated sum as surety, upon a bond in the sum of $150,000, and by entrusting the inchoate instrument he signed, to the principal, it was an authorization to the latter to validate the same by securing other such parts, complete the bond to the satisfaction of the United States and deliver the same. *Palacios et al. v. Brasher,* 18 Colo. 593, 34 Pac. 251, 36 Am. St. 305; *Butler v. United States,* 21 Wall. 272, 22 L. Ed. 614.

There was no limitation as to the number of sureties or their individual liability, but the total penalty of the completed bond was designated in each instrument as $150,000. Each surety had full knowledge that there were to be other sureties and other like instruments to the one that he signed, sufficient to satisfy the United States. The case is unlike those cited by counsel, where, on the face of the bond, there was a disclosure of the number and personnel of the sureties. In the instant case the United States was at liberty to require any number of sureties, and that each obligate himself to pay the full amount of the bond, or any less sum. In either event the instrument would be a bond in the sum of $150,000, and in the event of the default of the principal therein the obligees could collect from each surety the amount he bound himself to pay until the total of the sums so collected equalled the penalty of the bond, together with any interest properly recoverable; and thereupon the liability to the obligees would cease and the adjustment of the rights and equities among the sureties would be for them to determine. In a bond given by a principal and his sureties there is a primary obligation resting upon the former to which the obligation of the latter is incident. The penal sum designated measures the aggre-

gate liability of all the sureties; and the amount for which each surety binds himself measures his own liability. In the instant case not one of the several instruments constituting the completed bond speaks a different language from that which it spoke at the time it passed from the hands of the surety, and the language of all, taken together, makes certain that the completed bond is for $150,000.

3. The court erred in finding and adjudging that on May 27, 1905, the United States, by its officers and agents, ousted the contractor from the work and prevented its completion under the contract, and thereby discharged the sureties from liability on the contractor's bond. The facts in relation to the matter are undisputed and justify but one conclusion; and that is, that the contractor refused to comply with the contract and voluntarily abandoned the work, and surrendered the same to the United States. The contract (Clause 21 of the specifications) provides that, should the contractor fail to begin work, or delivery of material, or prosecute the work in such manner as to complete the contract within the time limit, etc., "notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then, and in either case, the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances," etc., and continue the work, etc.

On May 23, 1905, a notice in writing, based upon and in accordance with this provision of the contract, was prepared by the United States, addressed to and served upon the contractor. The notice referred to the aforesaid clause of the contract, and recited that the contractor had agreed to begin work promptly, and within ninety days thereafter to have a force and plant at work sufficient to complete the work required on or before the 15th day of April, 1908, and continued, "the plant and force which you have now on the ground is entirely inadequate to fulfill these conditions, and

you are hereby notified that, unless you comply with the conditions of the contract, within ten days from this date, the Secretary of the Interior will exercise the powers given him in clause 21 of the specifications, and will suspend your contract." May 27th the contractor, by its president, in writing, accepted service of the notice, and waived "the ten days allowed the Taylor-Moore Construction Company (the contractor) within which to comply with" its terms. The notice of acceptance further recited, "Authority is hereby given the United States government, or its authorized agents, to take charge of the work, equipment and material connected with the driving and construction of the Gunnison Tunnel," and was signed in the corporate name of the contractor, by its president. Thereafter, and on the same day, the contractor retired and the United States took over the work and continued the construction of the tunnel.

It is true that the contractor had the full period of time fixed in the notice in which to perform the things therein specified. However, by the terms of the contract, conditions might arise authorizing the United States to suspend the contract and take over the work prior to the expiration of such time. The language of the contract is that upon the contractor's "*neglect* or *refusal* to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice," the United States, through a designated agent, may, in either event, suspend the contract. The language of the contract, together with that of the notice, acceptance thereof and alleged waiver of time by the contractor, together with the latter's acts in the premises, will not permit the conclusion that the contractor was unlawfully ousted. On the contrary, it establishes, we think, very clearly that the contractor, immediately upon service of the notice, refused to proceed with the work and abandoned the contract. Under these circumstances, it was neither necessary for the United States to wait the full ten days' time to take over the work nor to notify the sureties of its intention so to do. More-

over, the complaint expressly alleged that the contractor, on or about May 26, 1905, "forfeited, abandoned and gave up said contract, and failed and refused to further proceed therewith, or to comply with and carry out the same, and became insolvent and unable to pay its debts," etc. Other creditors and intervenors, who subsequently became parties to the suit, adopted this allegation of the original plaintiffs. The allegation is binding upon such parties. While the sureties in their answer to the complaint deny this allegation and allege that the contractor was "ousted" and "compelled to involuntarily quit said work," and signed a stipulation with the plaintiffs containing a recital that the contractor was ousted, this does not affect the rights of the United States. Moreover, the facts in relation to the matter are fully set forth in the stipulation, and the legality of the acts constituting the alleged ouster is submitted to the court for determination.

Under the undisputed facts, we conclude that the contractor was not ousted, but voluntarily quit the work and abandoned the contract. One of the claimed modifications of the terms of the contract after the execution and delivery of the bond, so far as relied upon by the sureties, is the waiver by the contractor of the ten days' time he had, after notice served upon him, to provide means for a more energetic and satisfactory compliance with the contract. The fact that the contractor delivered to the United States the written statement of waiver and authority for it to take charge of the work, etc., and the United States did take immediate charge thereof, did not constitute a modification of the contract. It was not an agreement between the United States and the contractor. It was only proof that the contractor refused to proceed further and had abandoned the contract. The taking over of the work by the United States was by virtue of the construction contract.

4. The record discloses that surety Orman filed a petition in bankruptcy in the proper court on January 16, 1908, and was thereafter, on June 25th of the same year, dis-

charged in bankruptcy; that the bond forming the basis of this suit was duly scheduled in the bankruptcy proceedings, and that the United States was served with notice of all such proceedings and steps taken therein. The contention of the United States is that debts due it are not dischargeable in bankruptcy. It is argued by counsel that the question of whether or not a discharge of a debtor under the present bankruptcy act is effective against the United States has not been directly decided by the courts in any reported case. The rule is that, as a sovereign, it is not bound by the general language of a statute, and is not bound by the provision of an insolvency law, unless specifically mentioned therein. *Guarantee Title & Trust Co. v. Title Guaranty & S. Co.*, 224 U. S. 152, 56 L. Ed. 706, 32 Sup. Ct. 457. This case holds that there is a marked distinction between the former act and the present 1898 Bankruptcy Act. It declares that there was a deliberate change of purpose in the new act with reference to debts due the United States, and that § 1, which defines "creditor," affects the United States in its claims. The same declaration is made in reference to several other provisions, including the section providing that a discharge in bankruptcy releases the bankrupt from all of his provable debts, except such as are due as a tax levied by governmental authority. The debt here involved is a provable claim and Congress certainly had such character of debts due the United States in mind when it enacted the section relating to discharge of bankrupts. Section 57J of the Act declares that "Debts owing to the United States, * * * as a penalty or forfeiture, shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual cost occasioned thereby, and such interest as may have accrued thereon according to law." The language of the act is explicit. "A discharge in bankruptcy releases the bankrupt from all his provable debts, except such as are due as a tax levied by the United States," etc. The necessary inference from these provi-

sions is that if the United States holds any provable claim against a bankrupt, which is not for a tax, etc., it will be released by his discharge. 1914 Edition, Black on Bankruptcy, § 724; 2d Edition, Brandenburg on Bankruptcy, p. 266.

If Congress found it necessary, as it did, to expressly except taxes due the United States, etc., from the operation of a discharge, it would seem that if it intended that other debts due the United States should be excepted, it would have so declared. The omission of any exception of such debts is significant. The insertion of the provision with respect to taxes, without a like provision in regard to ordinary debts due to the United States, must be attributed to some purpose on the part of the law-making body. The purpose in view, we think, was that a bankrupt should be discharged from provable debts, to whomsoever owed, except as specified. Ascribing this meaning to the language is in keeping with the purpose and spirit of the bankruptcy act. The purpose of such acts, it has been frequently declared, is to relieve the honest debtor from the weight of oppressive indebtedness and to permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes. *Burlingham et al. v. Crouse,* 228 U. S. 459, 57 L. Ed. 920, 33 Sup. Ct. 564, 46 L. R. A. (N. S.) 148. The United States, when it engages in business enterprises, should be subject to the same laws and occupy no different position than individuals when so engaged. The judgment in favor of Orman is affirmed.

5. The court held and adjudged that each surety was liable for interest at the legal rate on the amount of his obligation, from the date of the commencement of the action, and the sureties contend that this was error. There is a conflict in the authorities upon the question of allowing interest upon the penalty of a bond. The weight of American authority, however, is in favor of allowing it, and such is the rule in this jurisdiction. *Empire State Surety Company v. Lindenmeier et al.,* 54 Colo. 497, 131 Pac. 437, Ann Cas. 1914 C. 1189. The penalty in a bond

is the amount which the obligors agree to pay, if the whole penalty be needed to satisfy the damages sustained by the obligee by a breach of the bond, and is due as soon as the breach occurs. As said in *Wyman v. Robinson,* 73 Me. 384, 387, 40 Am. Rep. 360:

"If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.

After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principles to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule common to contracts generally applies that where money is due and there is a default in payment, interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

The sureties make the claim, however, that it was impossible for them to pay the respective sums for which they were liable, because of the danger of double liability; and the further fact that they did not know, and could not ascertain, what proportion of their liability was due to the individual creditors. The bond performs a double function. It is intended to secure to the United States the faithful performance of the contract, and to protect persons from whom the contractor obtained labor or materials in the prosecution of the work. As said in *United States to Use of Anniston P. & F. Company v. National Surety Company,* 92 Fed. 549, 551, 34 C. C. A. 526, 528 (approved in *Equitable Surety Company v. United States, etc.,* 234 U. S. 448, 58 L. Ed. 1394, 34 Sup. Ct. 803): "The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons,

are as distinct as if they were contained in separate instruments."

Moreover, it seems that the government and the persons supplying the contractor with materials in the prosecution of the work, in case of default by the contractor, may each maintain a separate action against the sureties in the bond. *United States, etc., v. Perth Amboy S. & E. Co.,* (C. C.) 137 Fed. 689. The act does not postpone the right to have payment, because it may be that a cause of action had also arisen, or may arise, against the sureties in favor of another party for whose benefit the bond was likewise given. If one, so entitled, is paid, the obligation of the surety is discharged to the extent of the payment. Whether there were other, or how many other, creditors secured by this bond, or whether all their claims had been paid, was, under the Act of Congress, of no concern to the sureties in reference to the payment demanded by plaintiffs. The sureties would have been fully protected in the premises by paying the amount for which each was obligated into court, as was done in *United States v. Heaton,* 128 Fed. 414, 63 C. C. A. 156. The action of the court relative to allowing interest is approved.

6. The court held that, as the government did not complete the tunnel earlier than January 1, 1912, and, in fact, could not complete it prior thereto, it should, in justice and right, be precluded from recovering from the sureties on the bond for failure of the principal to comply with the contract, and that the instant case is controlled in that respect by the rules announced in *United States v. O'Brien,* 220 U. S. 321, 55 L. Ed. 481, 31 Sup. Ct. 406, and *United States v. Weisberger,* 206 Fed. 641, 124 C. C. A. 429. The court's action in the premises was error. The question was not at issue, because the court had, as heretofore stated, refused to permit the issue to be made.

7. The contention is made that certain claims were allowed as for labor and material that were not chargeable against the sureties. The bond follows the words of the statute and provides: "That such contractor or contractors

shall promptly make payment to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." By § 24 of the contract the contractor was required to furnish the United States engineers and assistants, with meals and camp accommodations, at any camp under his control, showing clearly that it was intended by the contract that such camps should and must be maintained. Indeed, the character, magnitude and location of the work rendered it imperatively necessary that boarding camps be maintained. Section 25 of the contract provides for sanitary and police regulations, and should the contractor fail to enforce them, the United States engineer is empowered to do so and charge the cost to the contractor. Section 52 requires the contractor to furnish lights and necessary facilities, etc.; and Section 54 requires him to furnish warehouses or sheds near the work for storing the cement until used. Sections 56 and 57 provide for the use of broken stone and contemplate the use of crushers and mixing machines; and Section 60 provides for long distance hauling, etc.

In considering the question presented, it is necessary that these matters be kept in mind. For to properly interpret the meaning of the words requiring the contractor to make prompt payment to all persons supplying him or them labor or materials "in the prosecution of the work provided for in such contract," it is essential to look to the contract, the ultimate character of the job to be completed, the location of the work, and the facilities that must be supplied for the doing of it. The labor and material essential in the prosecution of an ordinary job do not measure that which is necessary in the prosecution of the work covered by this contract. Its location was miles away from the habitation of man and the sources of supplies. It was understood that it would take months to complete it, and a large expenditure of money. The United States actually consumed seven years in its completion and expended over $1,000,000 in excess of the contract price.

A stipulation was entered into in relation to the claims

presented. The last clause thereof provides that the question of the liability of the sureties upon the bond sued upon, or interest thereon in case judgment be rendered against them, shall not be affected by the stipulation, and defenses thereto may be interposed. Section 5 of the stipulation is: "That in the prosecution of the work of constructing said tunnel, the said contractor did provide and make use of each and all of the supplies, accommodations, matters and things set forth in the sixth paragraph of plaintiffs' complaint." This paragraph is as follows:

"That in the prosecution of said work under said contract, it became and was necessary for the said contractors to use, furnish and provide material consisting of powder, steel, fuse, hammers, shovels, picks, nails, bolts, piping, and other hardware, merchandise and material, including tools and repairs for the machinery necessary to be used thereon, apartments for the men employed, and cooking, feeding, and sleeping accommodations and apartments, with furniture and implements, and supplies for, food and provisions for the large number of men employed by them, and for the government officials as is required in said contract and specifications, blacksmithing and supplies for the prosecution of said work, coal and fuel for the power and heating plants and cooking and other purposes necessary for the prosecution of said work, to provide and construct buildings and provide all material therefor, to employ and work steam shovels in the excavation of the extensive and deep excavation work to be done under said contract, to provide special clothing for the men at work in the tunnels and in water, to provide teams and outfits therefor, including feed for same, to provide medical attendance and service for the men engaged in such work, to use and provide hay, wood and material for the filling in of holes caused by cave-in of earth and rock in said tunnel work, to use and provide oil, packing and other material for the operation of the machinery and power plants used by them, and to furnish, provide and use various other kinds of material necessary for use in and about the said contract work, all of which

was so used under and in accordance with the provisions of said contract, and of the bonds given in pursuance thereof, and, as plaintiffs are informed and verily believe, are a part of the material necessary for such work, and constitute, are included in and form a part of the labor and material provided for and covered by the said contract and bond, for the prompt payment of which said bonds were given by these defendants."

Section 6 of the stipulation is to the effect that, because of the location and inaccessibility of the work, the contractor was under the necessity of making accommodations, housing and feeding the workmen and supplying them with necessaries while they were at work on the job. By Section 28 it was stipulated that provisions, dining room and kitchen furniture, sleeping apartments and bedroom furniture furnished by the contractor, as shown by bills referred to, were for the purpose of providing food and lodging for the men engaged in the prosecution of the work under the contract in the construction of the tunnel, and "were so used while the men were engaged in such work, and that deductions were made from the amounts due them for labor for the purpose of paying for same." By Section 29 it was stipulated "That upon the taking over of the contract by the United States from The Taylor-Moore Construction Company, the United States took possession and charge of all the kitchen furniture and utensils, dining room furniture and utensils, sleeping rooms, apartments and furniture, also of all the provisions, clothing, tobacco, coal, hardware, and other material not used by said contractors, and refused to return same to plaintiffs, or the parties who furnished same, or any part thereof, and made use of same in the continued prosecution of the work of the construction of said tunnel." By Section 31 it was agreed that the time-checks for labor and services therein shown to have been rendered were rendered under the contract here involved "for the construction of the Gunnison Tunnel."

Under these facts we are unable to say that the trial court was not justified in finding that the various items

composing the several accounts were properly chargeable. The Act of Congress and the bond in the instant case are susceptible of a more liberal construction than the mechanic's lien statutes, and the courts so hold. *American Surety Co. v. Lawrenceville Cement Co.*, (C. C.) 110 Fed. 717, 719. In that case it is said: "The underlying equity of the lien statutes relates to a direct addition to the substance of the subject-matter of the building, or other thing, to which the lien attaches, while the statute in question (being the one here involved) concerns every approximate relation of the contractor to that which he has contracted to do." Indeed, the court, in reaching its conclusion in the instant case, was justified in looking not only to the bond and statute, but also the contract, in ascertaining the items and services, the value of which was properly chargeable against the sureties. The rule applicable was recognized and applied in *United States to Use of Standard Furniture Company v. Aetna Indemnity Company et al.*, 40 Wash. 87, 82 Pac. 171, by the Supreme Court of Washington, where a bond given under the same Act of Congress was before the court. The plaintiff's claim was for the value of furniture in supplying and equipping a light-house built under contract with the United States. The contract and the specifications thereunder required certain furniture for the keeper's residence, and objection was made that the Act of Congress did not contemplate that the bond should apply to or cover the items in question. The court held that, as the contract provided for the furniture, the sureties were liable for its value. In so holding, the court said: "But, were it to be conceded that said furniture was not contemplated by the statute, it was clearly required by the contract, being a part of the subject-matter. The bond was given to secure the faithful performance of said contract and payment to all parties furnishing any material thereunder. Appellants under its contract should be held liable, without regard to any statute, as it has, by said bond, contracted to assume such liability, and there is nothing in said agreement contrary to public policy, nor can any ob-

jection be made to it or its terms requiring it to be held invalid."

8. An argument has been advanced as to the right of the United States to pro-rate with the laborers and material men in whatever sum the sureties are required to pay. We think the question is not before us for determination. The trial court held that the sureties were not liable to the United States because of the invalidity of the bond. The government was, therefore, eliminated, and there has been no issue or finding between it and the individual creditors as to the distribution of the fund. Moreover, there has been no fund realized that may be distributed. The parties claiming against the sureties are here in an action at law seeking solely a judgment upon their respective claims. The case is unlike those where sureties paid the penalty of the bond into court or assets were marshaled in equity for distribution according to the rights of the parties. The act under which the bond in question was given allows each creditor to bring a separate action for the establishment of his claim. He can sue without respect to the claim of other creditors; and they can sue without regard to his claim, since all have independent causes of action. This is also true as to the government. When the contractor fails to pay for labor and material furnished, a cause of action *instantly* arises upon his bond in favor of such creditors. A cause of action in favor of the government, however, may not arise until the completion of the work. The primary express promise of the contractor was to complete the work by a designated date. An additional agreement was that under certain conditions the government could take over the work and complete the same. Should this be done, a second material promise of the contractor was that after the government had completed the work, "any excess of cost arising therefor over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor." Such is the language of the contract. Therefore, in the instant case, while a cause of action arose in favor of the individual creditors when their re-

spective claims became due, no cause of action could possibly arise in favor of the government until the work was completed, and it is not claimed that this was done until 1912. It has been held that the government has no priority over an individual creditor in the fund paid into court by a surety on a bond like the one in this case, for the reason the statute has given the government "no such privileged position." As to individual creditors, no such declaration has been made, and the very purpose and object of the statute might warrant the conclusion that by inference individual creditors are placed in such "privileged position." However, if they are not, we are, nevertheless, quite certain that when a question of distribution arises, an equitable rule should be applied, depending upon the facts of each case. The underlying principle that should govern is that the courts are under duty to withhold relief to the sovereign, except upon terms which do justice to the citizen as determined by the jurisprudence of the forum in like subject-matter between man and man. The purposes and objects of the act requiring the bond, the time when different causes of action accrued, or judgments were rendered therein, the relation of the parties to the works constructed, the question of other security, if any, held by the different obligees in the bond, and questions of estoppel, may, in a given case, control.

The record discloses neither legal right nor equitable consideration that requires that these individual creditors should be further delayed in collecting that which has been their due for these many years. Clearly, the fact that the government had an independent cause of action against the same persons, arising some seven years thereafter, is not sufficient. The judgment in favor of the individual creditors against the Colorado sureties, except Orman, is affirmed; the judgment in favor of Orman, discharging him from all liability on the bond, is affirmed; the judgment against the United States in favor of the Colorado sureties, except Orman, is reversed and remanded, and if further

proceedings are had, such parties may amend their pleadings, if they desire.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 8716.

LINDSLEY v. CITY AND COUNTY OF DENVER.

1. OFFICER—*Ex Officio.* Where the statute provides that an officer shall act *ex officio* in another capacity, if the duties of each are of the same general nature, and inseparably blended in the statute creating the independent office, the incumbent holds but one office. If the duties of the two are distinct and governed by different and independent regulations, he holds two distinct and separate official positions.

On the first day of December, A. D., 1902, the City of Denver, and that part of Arapahoe included within its limits, were by constitutional amendment (art. XX) merged into the City and County of Denver. The inhabitants of the new municipality were authorized to frame a charter by which their affairs should be controlled and as a temporary measure of government it was provided that the charter and ordinances of the City of Denver should, "for the time being only, and as far as applicable", be the charter and ordinances of the City and County; that certain of the city officers' names should continue, occupying similar offices in the city and county, and that the District Attorney should be *ex officio* attorney of the city and county.

The County of Arapahoe was then a Judicial District (Laws 1891, 136), and the plaintiff was the District Attorney therefor, duly elected and qualified. The constitutional amendment provided that the new municipality should constitute a Judicial District.

Plaintiff, upon the adoption of the constitutional amendment, qualified in the office of the Attorney of the City and County of Denver, and performed the duties of that office until December, 1904.

Held that the office of attorney of the City and County of Denver was an office separate and distinct from that of District Attorney, and that plaintiff was entitled to the salary prescribed by the charter and ordinances of the City of Denver, in force at the date of the taking effect of the constitutional amendment.

2. CONSTITUTIONAL LAW—*Art. XX Construed.* It was contended for the defendant that the office of Attorney of City and County of Denver, *ex officio*, if separate and distinct from the office of District Attorney, was a new office, without any prescribed sal-

ary, that the provisions of the existing charter and ordinances of the City of Denver were not "applicable" to the new conditions.

But the court were of the opinion that this was mere assumption, that *prima facie* all provisions of the former charter and ordinances were applicable, and that it was without authority to declare inapplicable any of such provisions, unless the inapplicability was apparent from something in the constitutional amendment, that if the *ex officio* attorney of the city and county was not entitled to compensation for the services rendered in that capacity, he was, for the same reason, without any power or duty in that function, which was to impute to the framers of the constitutional amendment the supreme folly of creating an office without either duties or authority, and a municipal corporation without any officer authorized to represent it in the courts, and without authority to employ such officer.

The purpose of article XX, and the economies contemplated thereby considered and enlarged upon.

3. CONSTRUCTION—*Its Office and Limits.* A legislative purpose does not take effect unless expressed in written words.

From this follows the cardinal rule of construction that the intent of the legislature must be found in the words of the statute. If this be clear, and capable of but one meaning, there is neither room nor necessity for construction, and it is the duty of the courts to enforce the law as written without consideration of its policy, justice, or wisdom. When the written words may reasonably have different meanings, then, and only then, may the court consider the general purpose of the enactment, to aid in solving the ambiguity.

4. INTEREST—*Salary Public Officer.* A public *officer* whose salary is withheld from him is not entitled to interest thereon. He is not a creditor within the meaning of the statute, prescribing the rate of interest.

Error to Denver District Court, Hon. George W. Allen, Judge.

Mr. N. W. DIXON, Mr. CLAYTON C. DORSEY, Mr. WALTER E. SCHWED, Mr. HENRY A. LINDSLEY, *pro se,* for plaintiff in error.

Mr. JAMES A. MARSH, city attorney; Mr. THOMAS H. GIBSON and Mr. G. Q. RICHMOND, assistant city attorney, for defendant in error.

Mr. JOHN A. RUSH, *amicus curiae.*

Mr. Justice Bailey delivered the opinion of the court:

ON December 1st, 1902, Article XX, as an amendment, became a part of the State Constitution. By its provisions the city of Denver, and all included municipalities, and that part of the County of Arapahoe within the boundaries of the city, were merged into the City and County of Denver. That territory, by express provision, also became a separate judicial district.

A temporary local government, for the city and county thus formed, to exist until the people of the city should adopt a charter, was provided by section 3 of the article, in these terms:

"Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the Governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver, and of all included municipalities, and of the county of Arapahoe, shall terminate; except that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex-officio surveyor, and said chief of police shall be ex-officio of the city and county of Denver; and the then clerk and ex-officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver shall become, respectively, said officers of the city and county of Denver, and the District Attorney shall also be ex-officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified, as herein provided for; except that the then district judges, county judge and

district attorney shall serve their full terms, respectively, for which elected."

The last sentence of Section 2 of the amendment is as follows:

"If any officer of said city and county shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter."

Section 4 of the article provides, *inter alia*, this:

"Sec. 4. The charter and ordinances of the city of Denver, as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver."

When Article XX was adopted, the plaintiff was the duly elected, qualified and acting District Attorney of the County of Arapahoe, and upon its taking effect became thereunder District Attorney of the judicial district which the city and county constituted, and *ex officio* attorney of the city and county. Assuming that the provisions of the charter of the former city, relative to the office of city attorney, were applicable, he took the oath of office thereunder, as attorney for the city and county, appointed the assistants authorized by such charter, and entered upon the discharge of the duties of this office as therein defined, and continued to perform those duties until December 24th, 1904. During the years 1903 and 1904 appropriations were made for the payment of the salary provided by the old charter for the city attorney, but payment was refused by the treasurer, and this action was brought to recover such salary covering the period from December 1, 1902, to December 24, 1904.

There is no disputed fact, and the case presents only questions of law: First, did plaintiff hold two offices; second, if so, was a salary provided for the office of attorney of the city and county; and third, if yes, was plaintiff entitled to receive the salary of both offices?

Upon the first question, defendant contends that plaintiff held the office of District Attorney only, and that the purpose and effect of the provision declaring him to be ex officio attorney of the city and county was to transfer the duties of city attorney, as defined in the old charter, to the District Attorney, without compensation. No attempt, however, is made to show how any language of Article XX can have that effect.

When Article XX was framed and adopted, it was well understood that plaintiff, as District Attorney, was a state officer, whose salary was paid in part out of the treasury of the state, and in part but of the fees of the office, while, as attorney of the city and county, he was in the service of, and paid by, the local government. His powers and duties in the former capacity were defined by general law, and in the latter by local law. Moreover, it was expressly provided in Article XX that, as District Attorney, he should serve for the full term for which elected; while his term as attorney for the city and county would expire when an attorney should be selected, as provided by the charter to be adopted by the people of the city and county for that entity. *People v. Lindsley,* 37 Colo. 478. By the opinion in that case it was practically determined that plaintiff held separate and distinct offices, the tenures of which were different, terminating at different times and for different causes. The language of the provision, "and the District Attorney shall also be *ex officio* attorney of the city and county," plainly imports that plaintiff should hold two offices, to-wit, the office of District Attorney under state government, and the office of attorney of the city and county under local government. *Bonanchaud v. D'Herbert,* 21 La. Ann. 138; *People v. Edwards,* 9 Cal. 286; *Denver v. Hobart,* 10 Nev. 28; *State v. Laughton,* 19 Nev. 202, 8 Pac. 344; *Moore v. Foote,* 32 Miss. 480; *Wyoming v. Ritter,* 1 Wyo. 318.

By the law of California, when *People v. Edwards,* supra, was decided, the sheriff of each county was made ex officio tax collector. In that case Justice Fields said:

"The office of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to one would embrace, in the absence of statute, the obligations belonging to the other."

In *Denver v. Hobart,* 10 Nev. 28, it appears that the law provided that the lieutenant governor should be *ex officio* warden of the state prison. Held:

"The office of lieutenant governor and warden of the state prison are as distinct as though filled by different persons. The duties and obligations of one are entirely independent of the duties and obligations of the other. * * * The act refers to and mentions the lieutenant governor only as *descriptio personae* of the *ex officio* warden."

In *State v. Laughton,* 19 Nev. 202, the act involved provided that the lieutenant governor should be *ex officio* state librarian. The court said:

"There is no vacancy in the office of lieutenant governor by reason of respondent's failure to file a new and additional bond (as state librarian). It is claimed and conceded by both sides that the office of lieutenant governor and the office of state librarian are separate and distinct. Making a person an *ex officio* officer, by virtue of his holding another office, does not merge the two into one."

In *Moore v. Foote,* 32 Miss. 480, where a sheriff is made *ex officio* tax collector, they were held separate and distinct offices, the court saying:

"The duties and responsibilities of the individual in the different capacities in which he acts are as distinct as though each office was held by a different individual."

In *Wyoming v. Ritter,* 1 Wyo. 318, the decision was upon a statute providing that "the judge of probate shall be *ex officio* county treasurer." The court said:

"The conclusion, therefore, would seem irresistible if we look to the act alone creating the office of judge of probate, to ascertain the intent of the legislature, that it was the

intent and the legislature did create two separate and distinct offices, the duties of each to be performed by the same person. The correctness of this view as to the intent of the legislature is not lessened, but on the contrary greatly strengthened, by the fact that the duties of the office of judge of probate and that of county treasurer have no connection one with the other; each is clothed with different and distinct powers; each to perform different and distinct duties, the functions of the former being wholly judicial, the latter purely ministerial. The question, however, has been considered by one of the most respectable courts of the Union, and has, we think, ceased to be longer debatable. The Supreme Court of California has held, in numerous cases, that to make a person an *ex officio* officer by virtue of his holding another office, does not merge the two into one."

The principle underlying all the cases which determine the effect of provisions of law declaring that some officer, already chosen and acting, shall act *ex officio* in some other capacity, is this: If the duties of each capacity are of the same general nature, and inseparably blended in the law which creates and defines the undisputed office, then the officer holds but one office, but if the duties of the two capacities are separate and distinct, so that the officer while acting in the one capacity is governed by one law, and while acting in the other is governed by a different and independent law, then he holds two distinct and separate offices.

Plaintiff, as District Attorney, served under the state; as attorney of the city and county, under the city. A District Attorney, his duties and power, were defined by the state constitution and general laws; as attorney for the city and county, by the city charter and ordinances. His responsibilities and duties in the two offices were not only separate and distinct, but of an entirely different character, having no possible relation to or connection with each other. In such circumstances, under all the authorities, the words, "and the District Attorney shall also be *ex officio*

attorney of the city and county of Denver," mean that plaintiff held separate and distinct offices.

Upon the second question plaintiff contends that the office of attorney of the city and county was the office created in and by the old charter, continued under the new government, with all its incidents, except as to the term of office, because of the adoption of such charter temporarily as the charter of the new entity. Defendant contends that, if the position of attorney of the city and county was an office, it was a new one, created by Section 2 of Article XX, without compensation, as the power which created it neither provided for nor authorized compensation.

If it be assumed that the office was a new one, constitutionally created and filled, which view we think the correct one, still the conclusion that it was an office without compensation by no means results, as by such reasoning the conclusion that it was an office without powers and duties would necessarily follow. Certainly the supreme folly of creating an office without powers or duties can not be imputed to the framers of Article XX, and since they did not prescribe the powers and duties of the attorney of the city and county in the article itself, by declaring the charter of the city of Denver to be, so far as applicable, the temporary charter of the city and county, it follows that the powers and duties of the attorney of the city and county, until the adoption of the new charter, were as defined in the old one. That charter created the office of city attorney; fixed the term; prescribed his duties; authorized him to appoint two assistants and a stenographer; prescribed his salary and that of his assistants and stenographer. The phrase, "so far as applicable," as used in connection with the adoption of the temporary charter, does not place it in the power of the court to declare any provision of said charter inapplicable because of expediency, or because it does not accord with its notion of what ought to be, or with what it might think was the intention of the framers of the article. *Prima facie,* the whole charter was applicable, and to conclude that any provision

was inapplicable, it must be shown that something in the article rendered it so.

In *Hallet v. Denver,* 46 Colo. 487, 104 Pac. 1038, it was said:

" 'So far as applicable' has reference to Article XX. If there is nothing in that article which renders inapplicable the charter and ordinances of the former city, they are the charter and ordinances of the new city and county for the time being."

If any of the provisions of the temporary charter relating to the office of the city attorney were applicable to the office of attorney of the city and county, they were all applicable, unless some provision of Article XX renders certain of them inapplicable. There is nothing in Article XX which renders any of these provisions inapplicable, except the one fixing the term of office for two years, which is inconsistent with section 3, which requires the officers thereby appointed to hold until their successors are selected as provided in the charter. It can not be logically held that the provisions of the temporary charter defining the duties of the city attorney, authorizing him to appoint assistants, and fixing their salaries, were applicable, but that the provision fixing the salary of the attorney is inapplicable, for that would be purely arbitrary, and would be an exercise of a legislative and not a judicial function. Whether the office of attorney of the city and county be regarded as the office created by the old charter, as contended by plaintiff, or as a new office created by Section 3 ot Artile XX, as contended by defendant, it was manifestly intended that it should be governed by the provisions of the old charter relating to the office of city attorney, which intention was given effect by the adoption of such charter as the temporary charter of the new entity. Unless this is true, the provision, "the District Attorney shall also be *ex officio* attorney of the city and county," is meaningless, and without force or effect. The salary of plaintiff as attorney of the city and county must have been fixed by the same law which prescribed his powers and duties, to-

wit, the temporary charter, because that charter can not be held to have done the one, unless it did the other, and by the same token when it did the one, it also did the other.

There is no dispute upon the proposition that "where an officer may, and does, hold two offices, he is entitled to receive the compensation attached to each." 29 Cyc. 1424; Mechem, Public Officers, sec. 859; Throop, Public Officers, sec. 496; *United States v. Brindle,* 110 U. S. 688, 4 Sup. Ct. 180, 28 L. Ed. 286; *United States v. Saunders,* 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594; *United States v. McCandless,* 147 U. S. 692, 13 Sup. Ct. 465, 37 L. Ed. 334; *Cornell v. Irvine,* 56 Neb. 657, 77 N. W. 114; *State ex rel. v. Grant,* 12 Wyo. 23, 73 Pac. 470, 2 Ann. Cas. 382; and *In re Conrad,* (C. C.) 15 Fed. 641.

In *State ex rel. v. Grant, supra,* it appears that the Secretary of State was required to act as governor upon the death of the incumbent of the latter office. Upholding his claim to the salary of both offices, the court said:

"He is required to give attention to the duties of two state offices; his responsibilities are largely increased; and every principle of justice requires that he be compensated."

So in *In re Conrad, supra,* where a chief supervisor of elections, declared by statute to be *ex officio* United States commissioner, claimed compensation in both capacities, his claim was upheld, and the court said that where an officer is required to hold two positions, "It is consonant with the principles of justice and equity that compensation for the services should be made according to the provisions of the statute that applies to it, rather than to deny such remuneration on mere technical grounds and to require the gratuitous performance of the service by the officer." There is nothing in Article XX which either expressly or by implication takes this case out of the general rule.

Aichele v. Denver, 52 Colo. 183, 120 Pac. 149, is relied upon as an authority against the claim of plaintiff. That case involved an entirely different situation from the one at bar, both in fact and law. Aichele was county clerk and

ex officio recorder of Arapahoe County when Article XX was adopted. It was declared in section 3 thereof that "the then county clerk and *ex officio* recorder * * * shall be said officer of the city and county of Denver." In the action which he brought, Aichele claimed that he held also the office of city clerk, and was entitled to the salary of that office as fixed by the charter. There was not the slightest basis for this claim, except as an inference sought to be drawn from the *Johnson* case, 34 Colo. 143, 86 Pac. 233, which was later overruled by the *Cassidy* case, 50 Colo. 503, 117 Pac. 357. Aichele was by the clear, explicit language of Section 3 of Article XX appointed to one office, and to one office only. Plaintiff expressly held two separate and distinct offices. Nor does the reasoning of that case, based upon the purpose of the framers of Article XX to consolidate the duties of city and county offices in the hands of one set of officials, have the slightest application to this case, for the reason that the provision under consideration was not and could not be within that purpose, since it formed no part of the general plan. It should be observed that, as to all local officers performing consolidated duties, they were limited by Article XX to one compensation. Former city officials performing consolidated duties were by the last sentence of section 2 of the article limited to the pay provided by the charter, and former county officers designated to perform consolidated duties were named for only one office and could not, therefore, have two salaries. We search Article XX in vain to find any hint of such limitation as to the pay of the District Attorney. The provision as to that office was special and temporary. He was not an official of, nor did he discharge any duties pertaining to, the city and county. The appointment of the District Attorney to the office of attorney of the city and county was as foreign to the general plan of consolidation as would have been the appointment of the attorney general of this state. If the latter had been so appointed, no one could reasonably contend that the two offices were merged.

Moreover, a consolidation of the office of District Attorney, and of attorney of the city and county, was not a change which could be perpetuated by the people of Denver in their charter as contemplated by Article XX, because by section 2 thereof their authority is limited to providing for city and county offices. That is plainly decided in *Dixon v. The People,* 53 Colo. 527, 127 Pac. 930.

If, therefore, the clause as to the District Attorney be given its legal effect, it is plain that he held two separate offices, and the court may not by intendment permit the general rule, established for county and city offices under an altogether different state of facts and different provisions relative thereto, to derogate from the special provision adopted as to this particular office, without violating fundamental legal principles. The provision as to the District Attorney is *sui generis,* and has no analogy to the provisions relating to county and city officers. It is special in nature, grafted upon a general plan, and its intent must be determined from the express language as though standing alone. Thus considered, there can be no doubt that plaintiff held separate and distinct offices. This fact is emphasized by the use of the word "also," which means "beside," "as well as," "too." The meaning is that plaintiff, as District Attorney, should be attorney of the city and county as well; that is, that he should be District Attorney, and besides should be attorney of the city and county; or District Attorney and attorney of the city and county, too.

In the adoption of Article XX the people rightfully believed that if they should contract the boundaries of the county, and expand those of the city, so as to make them cover the same territory, and consolidate the duplicate county and city offices into the hands of one set of officers, they would be able to find competent persons willing to perform the consolidated duties of any two offices for the salary attached to one, and that a single salary would be full compensation for the performance of such consolidated duties. The office of District Attorney and of attorney of the city and county are not duplicates, and have no duties in com-

mon, nor is there any foundation for holding that the salary of the District Attorney was a fair and just compensation for performing the duties of both offices. On the contrary, the first charter adopted under Article XX, in 1904, fixed the salary of the attorney for the city and county at $4,600.00 per annum. That charter was framed by a convention of freeholders, and ratified by a vote of the people of the city and county. We are bound to assume that the salary so authorized is no more than a fair compensation for the responsibilities and duties of the office. From the 1st of January, 1905, to the present time the District Attorney in and for the city and county of Denver has been paid the salary attached by law to his office, and the attorney of the city has been paid the salary fixed for his office by the charter.

The charter of the city of Denver, enacted by the General Assembly, fixed the salary of the city attorney at $5,000.00 per annum; yet it is contended that in framing Article XX, the General Assembly was guilty of the injustice of intending to compel the District Attorney to perform gratuitously services which that body had valued at $5,000.00 before consolidation, and which the people of the city and county, since consolidation, and up to this good day, have valued at $4,600.00 per annum.

The evils sought to be remedied plainly were: First, the denial to the people of Denver of the right of local self-government; and second, the administrations of the functions of city and county governments, in the same territory, by two sets of officers. The conclusion follows that the purpose of Article XX was to grant Home Rule to the city and county of Denver, subject to the conditions that the people establish such a government as would consolidate the functions of city and county affairs so as to be administered by one set of officers. And the manifest purpose of section 3 was to remedy the second evil by immediately setting in operation a temporary or provisional government which the people of the city and county could perpetuate in their charter.

It is also urged by defendant that the purpose of the framers of article XX by terminating the term of the then city attorney was to require the District Attorney to act as attorney of the city and county, without compensation, and thus save the salary of such attorney during the temporary government. That is a pure assumption, and since no such intention is expressed in article XX the court may not give effect to a suggestion of a merely speculative character. Legislative purpose does not become law unless it be expressed and enacted in written words. No matter how clear the purpose may be in the legislative mind, if language is not employed to make it effective, the courts cannot supply the deficiency; and the purpose fails in whole or in part, according to the insufficiency of the language. This is the fundamental principle of written law. From it follows the cardinal rule of construction that the intent must be found in the language of the instrument. If the language be clear, and capable of but one meaning, then there is no necessity or room for construction. The duty of the courts is to enforce the law as written. The policy of the law does not concern them, nor whether it seems wise or unwise, just, or unjust, when the written language is ambiguous, and may reasonably have different meanings, then, and then only, may a court consider that it conceives to be the general purpose of the enactment to aid it in resolving such ambiguity. But in respect to the language under consideration, "and the District Attorney shall also be the attorney of the city and county," there is no uncertainty or ambiguity, and there is no phrase or word in article XX which casts any doubt upon its meaning. The amendment in plain and unequivocal language ended the term of the old city attorney, created the new office of attorney of the city and county, and named a new incumbent. The right and authority to do this is clear, and the motive is of no concern of the courts. The whole situation may be thus expressed:

1. Plaintiff held two separate offices.
2. To each of them a salary was attached.

3. Under the general rule of law he was entitled to both salaries.

4. There is no provision in article XX which takes his case out of the operation of this rule.

"In the case of all written law it is the intent of the law that it is to be enforced. But this intent is to be found in the instrument itself. * * * That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."

"It is not allowed to interpret what has no need of interpretation. Where an instrument is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures to restrict or extend it is but to elude it. If this dangerous method be once admitted, there will be no instrument which it will not render useless."

Howell v. The People, 7 N. M. 9-83; *Beardstown v. Virginia,* 76 Ill. 34; *Rasmussen v. Baker,* 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 733; 38 L. R. A. 772; 8 Cyc. 732; 6 A. & E. Enc. 922.

The foregoing principles are applicable in this case. To prevent the clause, "the District Attorney shall also be *ex-officio* attorney of the city and county," from being meaningless and non-effective, it is necessary to hold that it was intended that the office of attorney of the city and county should be governed by the provisions of the charter relating to the office of city attorney. That point being settled the meaning of the enactment is clear; and it may well be added that if that meaning had not been adopted and acted upon during the period of the temporary government, the proper and orderly administration of the vast legal business of the city would have been impossible. When, as here, the law is plain, the court should enforce it as written.

Paraphrasing the language of the Supreme Court of Wyoming, already quoted:

"The plaintiff was required to give attention to a very important state office, and also to a very important city and county office. His responsibilities were largely increased, and every principle of justice requires that he be compensated."

The inherent justice of this proposition appeals to all. The plain language of article XX, and every fair inference to be drawn from it, manifests the intention that plaintiff should hold these offices as separate and distinct positions, and receive the salary attached to each. No question of double salaries for consolidated duties under local government is presented, but the question is whether it was intended that a District Attorney, entitled to his salary as such, as every other District Attorney in the State was, should also be held responsible for the performance of the very important and arduous duties of attorney of the city and county of Denver without any compensation? There is nothing in article XX indicating that any such unjust imposition was intended and the answer to the question must be in the negative and the judgment accordingly reversed.

The judgment is reversed and the cause remanded to the District Court, with directions to enter judgment for plaintiff according to the prayer of his complaint.

Decision *en banc*.

Mr. Justice Allen not participating.

Opinion on petition for re-hearing.

Per curiam:

After careful consideration of the grounds urged for a re-hearing, the court is still satisfied that its conclusion, as to the general right of plaintiff to recover, is sound.

The defendant in error urges that in any event the plaintiff in error has no right to interest on the sum found due him as salary; thus raising a question not heretofore argued or considered.

We are of the opinion that the position is well taken.

In *Montezuma County v. Wheeler*, 39 Colo. 207, it was held that a division superintendent of irrigation, having a claim against the county for salary, was not entitled to

interest thereon. This was upon the ground that a county, being an involuntary political division of the state, shares with the state an exemption from liability for the payment of interest, in the absence of an express provision for such payment. The plaintiff in this case sues for salary due him from a municipality and the case is clearly within the above named decision.

The case of *Golden v. Western Co.*, 60 Colo. 382, in which interest was allowed on a debt due for material furnished in the construction of a water works system for the city, is distinguished from *Montezuma County v. Wheeler, supra*, and is distinguishable from the case at bar. The contract for material for the water works was entered into by the city, as the court points out, in its private or business capacity; while the claim in the case at bar is against the municipality in its governmental capacity. The Montezuma County case is conclusive upon the question of interest here raised, and we hold that no interest can be allowed on plaintiff's claim.

Another ground for holding that interest should not be allowed is that a public officer, having a claim for salary, is not a *creditor* of the State, or of a political subdivision thereof, and, therefore, such demand does not fall within the terms of the interest statute. This fact clearly distinguishes the case from the cases cited by counsel as being in conflict with the Montezuma County case. They dealt with the question of interest on instruments in writing and money due on account, where the relation of creditor and debtor plainly existed. They have, therefore, no bearing on the question here involved.

The opinion heretofore delivered will be construed as allowing judgment only as to the principal of the claim. The opinion is modified accordingly, the petition for rehearing is denied, and cause remanded to the district court with directions to enter judgment for plaintiff only for the amount of salary due and costs.

Mr. Justice Allen not participating.

Decided June 4, A. D. 1917. Rehearing denied May 6, A. D. 1918.

No. 9275.

THE INDUSTRIAL COMMISSION *v.* JOHNSON.

1. INDUSTRIAL COMMISSION—*Findings of—Effect,* supported by credible and substantial evidence must be accepted by the courts. But their award not in accordance with their findings, will be rejected.
2. —— *Construction of the Statute.* The statute organizing the Industrial Commission (Laws 1915 c. 180) is highly remedial in purpose, and to be liberally construed.
3. —— *Blindness—Compensation.* One who has only such vision as enables him to recognize a form before him, but not to distinguish its outline, is blind, within the meaning of the statute.

Error to Denver District Court, Hon. John I. Mullins, Judge.

En banc.

Hon. LESLIE E. HUBBARD, Attorney General and Mr. JOHN L. SCHWEIGERT, Assistant Attorney General, for The Industrial Commission.

Mr. GEO. P. WINTERS, Messrs. FILLIUS, FILLIUS and WINTERS, for the other plaintiffs in error.

Mr. HENRY E. MAY, for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error filed with the Industrial Commission a claim for compensation under Chapter 179, Laws of 1915, for injury to one of his eyes while in the employ of plaintiff in error The Spratlen-Anderson Mercantile Company.

On a hearing on the complaint the Commission found that Johnson had become totally blind in one eye by reason of said injury, and awarded him seven dollars per week for 104 weeks. Later, a rehearing was granted; the Commission found that Johnson still had useful vision, and reduced the period during which compensation was to be paid to 9 and 5/11 weeks. It found also that claimant, having received $147, was owing the respondents the sum of $80.80.

Thereupon the claimant filed suit in the District Court of the City and County of Denver to set aside and modify the award on the second hearing, and to reinstate and confirm the award made on the first hearing. The court determined that the claimant's disability amounted to total blindness, and made an award on that basis.

The case is now here for review under said statute.

It is contended by the plaintiffs in error that the court's judgment is based upon new findings of fact, which, by the statute, it has no power to make. The several errors assigned are all based upon the proposition that, if the findings of the Commission are supported by credible and substantial evidence, they must be accepted by the court; and that the court rejected findings which were thus supported.

That the rule of law is as counsel claim is not to be doubted, but that the trial court violated it is not established.

The Commission found that the Claimant, prior to the injury,

"had suffered a reduced vision to that eye of 6/66, or 1/11 of normal vision; * * * that such diminution of vision, due to the accident, is not more than 1/11th of a total loss of vision in said eye, and that claimant still has useful vision in said left eye since the accident. * * * that he is entitled to such proportionate amount of compensation at $7 for 104 weeks, as the diminution of vision that he actually suffered, in this eye by reason of the accident, bears to total blindness, which the Commission finds, as aforesaid, to be 1/11th."

The award on that basis, for 9 and 5/11 weeks, is then made, as above stated.

Counsel for plaintiffs in error treat this finding as being that Johnson lost 1/11 of what vision he had when injured, which would be 1/121 of normal vision. That, however, is not supported by anything in the record.

Nowhere in the evidence is 1/11th of anything mentioned except as a fraction of normal vision, and Dr. Strick-

ler testifying for the plaintiffs in error, stated that he could not say what proportion of the vision, which claimant had at the time of the accident, had been lost because of the injury; but that it was more than fifty per cent. He had already testified that, because of trachomy, claimant had lost 10/11 of normal vision before the accident.

It clearly appears from the record that the Commission was of the opinion that the amount of compensation is to be determined by ascertaining how much an injury contributes to a disability. That is, it is assumed that if a claimant was partially disabled prior to the injury which forms the basis of his claim, and because of the injury he be found totally disabled, he is not to receive the compensation fixed for disability, because it was not all due to the injury. To illustrate: If claimant before the injury had only one half or normal vision, and lost one-half of that, he would be entitled to one-quarter of the compensation allowed for total blindness.

It is hardly necessary to say that such is not a correct construction of the law. *Hills v. Oval Dish Co.*, 191 Mich. 411, 158 N. W. 214; *Duprey v. Maryland Casualty Co*, 219 Mass 189, 106 N. E. 686; and *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020. That being the understanding of the Commission, when the claimant is given 1/11th of the compensation for total disability, it is clear that the Commission based its award on the loss of 1/11th of normal vision.

The evidence showed that at the time of the hearing Johnson was unable to count the fingers on one's hand at any point before the left eye, while before the injury he could distinguish them at a distance of about ten feet, and could read. After the injury, he could distinguish an object between himself and the light, but could not determine what it was. He had what the medical witness called "dodging vision"; that is, he might be able to get out of the way of an approaching object, though he could not tell what it was.

On these findings the Commission determined that the claimant still had "useful vision," and was not entitled to the compensation allowed for total blindness of one eye.

It does not appear how he could have any vision left, if, having only 1/11th of vision, he lost 1/11th.

Whether or not a condition found to exist amounts to total blindness, as used in this statute, is a question of law, in deciding which the spirit and purpose of the law must be considered.

The act is highly remedial, beneficent in purpose and to be liberally construed. To say that a man who has only such vision as enables him to recognize a form before him, without being able to distinguish its outlines, is not blind within the meaning of this law, is to apply to it a strict rule of construction, and defeat its evident purpose.

The District Court held that the award of the Commission on the last hearing was "unlawful and unreasonable;" that the Commission "acted without and in excess of its powers, and that the findings of fact * * do not support the award."

It was clearly within the powers of the court to determine, as a matter of law, that the award was not in accord with the findings, and, having done so, and made an award which is supported by the findings, there is no reason for disturbing the judgment. It is accordingly affirmed.

Judgment affirmed.

Mr. Justice Scott not participating.

Decided March 4, A. D. 1918. Rehearing denied May 6, A. D. 1918.

No. 8956.

TRIMBLE v. COLLINS.

1. TRIAL—*Questions for Court and Jury.* It is the province of the court to construe a contract, and to submit the interpretation of a writing to the jury is error.

The jury determine whether compliance with a contract is shown; and where an agreement is to be performed in reasonable time,

e. g., as where no time of performance is specified, the question whether it was so performed is for the jury.

2. CONTRACT—*Construed.* The term of a lease was to begin at a day specified. The lessor agreed to make certain improvements, but the time of completion was not mentioned. *Held* that nothing to the contrary appearing in the words of the writing, the law presumes an intent that the improvements were to be made within a reasonable time.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Department.

Mr. FRED W. STOW, Mr. RUSSELL W. FLEMING, Mr. HERMAN W. SEAMAN, Mr. FRED W. STOVER, for plaintiff in error.

Mr. L. R. RHODES, for defendant in error.

Opinion by Mr. Justice Teller.

PLAINTIFF in error brought suit against the defendant in error for rent under a lease in writing; verdict and judgment for defendant. The plaintiff brings the case here for review.

The principal ground urged for reversal is that the court erred in giving and in refusing certain instructions.

The lease was executed June 3, 1913, and the term was to begin on June 15.

The lease provided that the plaintiff was to make some changes and improvements in the building leased; but no time was specified for the doing of the work. It was not completed on the 15th, and the defendant declined to take possession and pay rent.

It is urged that the court erred in submitting to the jury in instruction No. 2 a question as to the construction of the lease. The instruction reads:

"If you find that by the terms of the contract it was made the duty of the plaintiff to complete the improvements and repairs on the said building prior to the 15th day of June, 1913, his failure to complete said improvements and re-

pairs prior to said time will defeat his right to recovery in this case;"

The giving of this instruction was error.

It is the province of the court to construe a contract, and of the jury to determine whether or not the facts proved show a compliance with the contract.

By instruction six the court instructed the jury that, if there was no time fixed for making the improvements, then they should have been completed by June 15. This determines a question which by instruction two was left to the jury, and is bad because likely to be confusing. Not only that, but it is not a correct construction of the lease. There are no words used from which it may fairly be inferred that the making of the improvements was a condition, the non-performance of which would defeat the leasehold estate.

To operate as a condition precedent the words used must import that the vesting or the continuance of the estate depends upon a named contingency.

No time being stipulated for the completion of the repairs, the law presumes an intent that they should be made within a reasonable time. *Walling v. Warren*, 2 Colo. 434, 9 Cyc. 611. It was for the jury to determine whether or not the repairs were in fact made within a reasonable time.

Because of these errors in instructions the judgment is reversed.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

Decided February 4, A. D. 1918. Rehearing denied May 6, 1918.

No. 8934.

CORYELL ET AL. v. NAPIER, RECEIVER.

1. APPEAL AND ERROR—*Judgments not Supported by the Evidence.* A judgment resting upon a finding of fact not supported by the evidence will be reversed.

2. FRAUD—*Pleading.* A general allegation of fraud, e. g., that an acquaintance was obtained "by fraud and misrepresentation", stating no particulars, is not sufficient in law.
   So as to fraud and misrepresentation, alleged to have been practiced upon the court, in obtaining a judgment.
3. RECEIVER—*Rights of.* A receiver has no greater right than the person or corporation over whose estate he is appointed.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. JOHN L. NOONAN, Mr. J. W. DOLLISON, Mr. HARRY S. SILVERSTEIN, for plaintiffs in error.

Mr. EDWIN C. KINGSBURY, Mr. J. W. KELLEY, for defendant in error.

Garrigues, J.

THE Garfield County Coal and Fuel Company, a close corporation, was organized in 1901, with a capital stock of 50,000 shares, 5,000 of which were issued September 28, 1901, to one Pauline Fawcett, the remainder being owned by Perry and Minnie Coryell, save enough shares to qualify directors. December 4, 1909, Fawcett commenced a stockholders' suit at Glenwood Springs, in the District Court of Garfield County (being No. 1401 in that court and No. 7763 here), for an accounting, against the Coryells who had control of the handling of the affairs of the company, in which the fuel company was joined as defendant. In this suit she alleged she was the owner of 5,000 shares of the capital stock; that the Coryells had mismanaged the company's affairs, and appropriated large amounts of its property and money to their own use, and she sought to recover a judgment against them on that account, in favor of the company. In this suit the court found that she was the owner of the stock as she claimed. An accounting was had before a referee, and April 24, 1911, the court entered a decree—spoken of as the McCall judgment—requiring Minnie Coryell to deed certain real estate, standing in her name, to the company, and entered a personal judgment against her for $20,475.65 in favor of the fuel company, a

personal judgment against her husband for $1,000 in favor of the fuel company, also a money judgment for $2,500 against the fuel company in favor of De Lan and Campbell, as attorneys' fees, for them as Fawcett's attorneys in prosecuting the suit against the Coryells. The court also issued an injunction against the Coryells, and appointed one George Edinger as receiver of the fuel company. The Coryells brought the case here for review on error, and March 29, 1912, we granted a supersedeas, and a bond in the sum of $30,000 was filed the next day. (See *Coryell v. Fawcett,* 54 Colo. 353, 130 Pac. 838.)

Fawcett was indebted to Minnie Coryell upon various promissory notes, upon which the latter brought suit (being case No. 1655 in the District Court), and in July, 1913, Fawcett confessed judgment in this suit on the notes, and judgment was entered against her in favor of Coryell in the sum of $7,809.15. November 15, 1913, certain judgment creditors of Fawcett brought suit in the District Court (being No. 1684 below and No. 8951 here) against the Coryells to cancel and set aside this judgment, and to procure the appointment of a receiver to take charge of the property of Fawcett. After a trial in that case, the court entered a decree therein, cancelling the judgment by confession and appointing B. T. Napier, defendant in error in this case, receiver of the property and effects of Fawcett. On review we reversed that portion of the judgment cancelling the judgment in favor of Coryell, but allowed the portion of the decretal order appointing Napier receiver, to stand. (See *Coryell v. Olmstead,* — Colo. —, 172 Pac. 14.) It was by virtue of this appointment that Napier as receiver, instituted the instant case.

January 23, 1914, Napier as receiver, brought the instant suit (being No. 1702 in the lower court and No. 8934 here), against Perry Coryell, Minnie Coryell, The Garfield County Coal and Fuel Company, C. C. Parks as President of the First National Bank of Glenwood Springs, and the bank.

A preliminary statement here will materially assist in an understanding of the case.

About January 18, 1904, Perry Coryell went to Fawcett's house to see her about the company's finances which were in bad condition. Among other liabilities, it owed one Brandenburg some $10,000 borrowed money, represented by notes upon which the Coryells and Fawcett were personally liable. Not finding her at home, he tied a note on the door knob which stated in effect, that if she did not care to contribute her proportional share toward the payment of the company's debts, that they, the Coryells, would assume and agree to pay all the company's liabilities if she would assign her 5,000 shares of stock in trust to Parks, to be by him turned over to them when they had paid the debts of the company, and relieve her from all personal liability; that she might take her choice of either contributing her proportional part of the company's liabilities, or assign her stock to them, and they would pay the debts, or have a receiver appointed, and the affairs of the company wound up. To this letter Fawcett replied two days later as follows:

"January 20th, 1904.

Mr. P. C. Coryell,
Dear sir:

I have received your letter of recent date concerning the financial condition of the mine. I find my own affairs are such that I cannot do anything toward helping out financially. But, if it will be agreeable to you as you suggested, I will turn over to C. C. Parks, to be held in trust by him, my shares in stock, if you will free me from my obligations on account of the mine. These shares to be turned over to you when you have freed me from personal obligations.

Very truly,
Pauline M. Fawcett."

July 25, 1904, to accomplish the purpose expressed in the letter, she assigned and delivered the stock in trust to Parks, in the following words:

"For value received I hereby sell, transfer and assign to C. C. Parks in trust, five thousand the shares of stock within mentioned and do hereby constitute and appoint ---------- my attorney irrevocable by me and in my name to transfer the same on the books of the company with full power of substitution in the premises.

Witness my hand and seal this 25th day of January, A. D. 1904. Pauline M. Fawcett."

The Coryells then pledged all the stock to the bank from which they borrowed the money, and paid up all the obligations, debts and liabilities of the fuel company, by which Fawcett was released from any further liability thereon, and March 30, 1912, Fawcett wrote the bank in the following letter to deliver the stock to Coryell.

"Newcastle, Colorado, March 30, 1912.

Mr. C. C. Parks.

Dear sir:

Will you kindly write Mrs. Minnie B. Coryell's name in the proper blank space on the back of the certificate of stock of the Garfield County Coal & Fuel Company which you hold in trust for me, and send the same to her; let me know if you do so, and if she receives it.

Thanking you for the favor, if granted, I am,

Very truly,

Pauline M. Fawcett."

These matters seem to have been forgotten at the trial, but were set out as newly discovered evidence in support of a motion for a new trial in case No. 1401, to resist which Fawcett filed a counter affidavit in which she denied receiving the note or letter from Coryell, or of writing the letter dated January 20, 1904, or of assigning the stock to Parks January 25, 1905, or of writing the letter dated March 30, 1912. In short, she denied the whole transaction set out in the motion for a new trial. The trial court overruled Coryells' motion and they brought the case here for review on error. Fawcett, who had in the meantime discharged De Lan and Campbell, and em-

ployed new counsel, voluntarily entered her appearance here March 14, 1912, and waived the issuing of a writ of error, and joined in the assignments of error, and confessed error, in which, among other things, she admitted that the court erred in overruling Coryell's motion for a new trial; that it erred in finding and deciding that she was a stockholder in the fuel company; that she was not such a stockholder, and was not entitled to an accounting; that the court should have granted a new trial, and erred in holding that she was a stockholder, or had any interest in the corporation, and asked us to enter a final judgment directing a dismissal of her complaint.

Had we dismissed the writ at that time, at her request, on her confession of errors, the cause would likely have been dismissed in the lower court, and De Lan and Campbell probably would have lost their judgment for attorney's fees. So, before acting, we notified them of the situation. Thereupon they appeared and resisted the dismissal of the case, and claimed that since the trial, Coryell and Fawcett had fraudulently conspired together to reverse the judgment in favor of Fawcett, for the purpose of cheating and defrauding them out of their attorneys' fees, and they moved to strike the petition for a supersedeas, and the confession of errors, from the files. March 29, 1912, we entered an order that the judgment in the case be stayed upon the filing of a supersedeas bond by plaintiff in error in the sum of $30,000, which bond was given the next day. April 18, 1912, we appointed a commission to take testimony in reference to the preparation and filing of the confession of errors by Fawcett. April 22, 1912, her evidence was taken before the commission, and in substance is to the effect, that De Lan and Campbell were no longer her attorneys, but that she had employed other counsel to represent her in the case before the Supreme Court. She said: I told him, Coryell, that I was in the wrong. That I had found the stock had been delivered; that I endorsed it in trust under certain options not on the stock, and put it in the possession of Parks. That the letter, which I was

trying to get hold of, had been discovered. I had written a letter (referring to the letter of January 20, 1904), it was in my handwriting; I was wrong. I told Coryell I was wrong. I told my attorneys I was wrong, and would never go into the Supreme Court. I told them to go no further. I quit the case because I was in the wrong, and was not going to pay another dollar when I knew I was in the wrong. If I had not been shut up by my attorneys, I would not be here now. After the stock was produced, I didn't want to go on with the trial. I told Parks I had no rights in the fuel company; now is the time to know it; I was mistaken, and I admit it. I have been sorry ever since I signed the affidavit resisting the motion for a new trial. I hesitated a long while before I signed it. I read the confession of errors over carefully before swearing to it, because I had sworn to one paper, and I was sorry for it, and I was careful after that. I have not the least thing in the world to do with the stock, and no interest in it. I was in the wrong. If I had told it three years ago, I would not be here tonight. I always expected the thing to jump up like a ghost from behind. I quit because I was in the wrong of it. I signed the confession of errors because I wanted the case out of the Supreme Court because I know it to be right and just to do it. The affidavit I signed was not correct. I hesitated a long time before I signed it, and was sorry afterwards I did not take it out.

January 13, 1913, we dismissed the writ of error because, as we stated, after Fawcett filed her confession of errors and admitted she was not a stockholder, there was no longer any controversy between them. We thought it unnecessary for them to bring the case here to effect a settlement, and suggested that in so far as the rights of the parties were concerned, the settlement should be accomplished in the District Court. The parties then, through Judge Cavender, sitting for Judge Shumate, settled and adjudicated everything in the case and fully satisfied the judgments, paid all the costs, and the judgment of De Lan and Campbell for attorneys' fees, which with interest,

amounted to $3,031.22, and the court April 16, 1913 entered a final order and decree, and a final discharge.

The Coryells, under permission first obtained from the court, sold a tract of land to one Kelley for $3,200 cash, which was used in paying the De Lan and Campbell judgment; and sold another tract to one Prendergast for $5,100, for which a note and mortgage were taken. This note, together with the 50,000 shares of the fuel company's stock, in fact everything which the Coryells had or owned, was hypothecated to the bank, from which money was borrowed to settle up the McCall judgment, and costs, in case No. 1401. The suit had been very expensive to the litigants, just the receiver's costs and fees alone, amount to $731.41. To perfect the settlement, a meeting of all the stockholders of the fuel company was called and held, at which the proper officers were, by resolution, authorized and instructed to enter satisfaction and discharge of the judgment entered in favor of the company against the Coryells. In accordance with this resolution, the acquittance of the fuel company, duly made and acknowledged, was filed in court April 16, 1913, at the time the matter came on for final hearing before the court, upon the application of the Coryells for a clearance of the judgment entered April 24, 1911, and for the discharge of Edinger as receiver of the fuel company. The Coryells were, by order of court, allowed to make such conveyances of property as they might desire, to obtain funds to meet all the expenses and costs, notwithstanding the restraining order of April 24, 1911, but the order then entered, provided that it should in no wise prejudice or affect Fawcett, unless she should voluntarily and of her own accord release all rights which she had or held under the decree; and that upon paying the De Lan and Campbell judgment, and all the costs, and obtaining a release from Fawcett, and the fuel company, it was ordered that the Coryells should be discharged from the judgment, the court order stating that the judgment was made final and complete, for the purpose, among other things, of be-

ing filed in the recorder's office, as a release and discharge from the decree of April 24, 1911, and it was so filed.

Fawcett's release and acquittance, duly acknowledged by her, was obtained and filed the next day pursuant to the decree, and all parties connected with the old suit, No. 1401, were paid off, and all judgments, costs and claims satisfied and discharged in full, and releases, receipts and acquittances were duly filed with the sanction and approval of the court.

The amended complaint, filed April 1, 1914, recites the judgment in the old case No. 1401, wherein the fuel company obtained a personal judgment against Perry Coryell for $1,000, and against Minnie Coryell for $20,475.65, and Minnie Coryell was decreed to convey certain land to the fuel company, and Fawcett was declared to be the owner of 5,000 shares of stock in the fuel company, represented by certificate No. 19. It alleges that the fuel company had received large royalties of which Fawcett had received nothing, and that the Coryells had sold land to Prendergast and to Kelly, of which Fawcett had received nothing; that Fawcett's release and acquittance was obtained by fraud and false pretenses; that the final order of court entered April 16, 1913, by Judge Cavender, was obtained by fraud and false representations; that an accounting was necessary to determine how much defendants were indebted to Fawcett on the judgment, and that it was necessary to appoint another receiver of the fuel company in place of the one discharged.

The prayer of the complaint was to the effect that the acquittance of Fawcett, and of the fuel company, and the final order of court and discharge in case No. 1401 entered April 16, 1913, all be set aside; that Parks and the bank be required to surrender the 5,000 shares of stock belonging to Fawcett; for an accounting and the appointment of another receiver for the fuel company, and for another injunction.

May 8, 1915, the lower court in the instant case, made a finding of fact that the 5,000 shares of stock represented

by certificate No. 19, issued to Fawcett, were still the property of Fawcett, and had only been assigned to Minnie Coryell for the purpose of assisting her in obtaining a supersedeas bond in case No. 1401. Based upon the finding that she still owned the stock, the court found and held that Fawcett's acquittance was without consideration and void, and was given in accordance with and to embrace her confession of error in the Supreme Court, in which the judgment in her favor was affirmed, notwithstanding her confession of error; that the release or satisfaction of judgment filed by the fuel company April 16, 1913, at the time of making the final order and discharge of that date, was not made in good faith and is void, because Fawcett as a stockholder, was not notified of the meeting, and did not participate therein; that the final order of court entered by Judge Cavender April 16, 1913, should be set aside and held for naught, except that portion discharging the receiver and appointing another receiver for the fuel company, and that a restraining order issue. Judgment was entered accordingly and Napier, who as receiver of Fawcett brought the suit, was appointed receiver of the fuel company, whereupon the Coryells prosecute this writ of error to review the action of the trial court.

GARRIGUES, J., after stating the case as above:

The purpose of the action is to revive or reinstate the old judgment of April 24, 1911, in case No. 1401, and for an accounting. The judgment below was based upon the erroneous theory that Fawcett owned 5,000 shares of the fuel company stock. The complaint alleges the stock had been assigned in trust to Parks for the purpose of transfer, in case the property was sold, in which event Fawcett was to receive $5,000 in money; that the trust terminated because there was no sale of the property, but that Parks did not return the stock, which Fawcett still owned. The court found the stock had been assigned to Parks to assist the Coryells in obtaining an appeal from the judgment entered in favor of Fawcett against them April 24, 1911, although, as appears from the record, the assignment was seven

years before, to-wit, January 25, 1904, and the purpose of the assignment having been completed, the court found that the stock was the property of Fawcett.

The evidence does not support either position. Plaintiff sued as receiver of Fawcett, and the basis of the action is her ownership of the stock; if that fails, the whole case fails. The complaint pleads the judgment of April 24, 1911, in favor of Fawcett against the Coryells, and seeks to have the acquittance filed by Fawcett, the acquittance of the fuel company and the final order and discharge entered April 16, 1913, vacated and set aside, and the old judgment reinstated. The answer pleads the acquittance of Fawcett and of the fuel company, and the clearance of the Coryells by the final order and discharge. The replication alleges generally that Fawcett's acquittance was obtained by fraud and false pretenses, and that the fuel company's acquittance was obtained by fraud and misrepresentation. There is no cause of action stated in the complaint that is not embraced in the final order entered by Judge Cavender April 16, 1913. The judgment in the case at bar follows the finding of the court, that Fawcett still owned the stock at the time of the trial, and of course, that being erroneous the judgment can not stand.

When case No. 1401, being No. 7763 here, was docketed on error March 14, 1912, Fawcett voluntarily entered her appearance and filed a confession of errors duly acknowledged and signed by her, in which she stated that she was not a stockholder, had no interest in the fuel company, and asked us to order a dismissal of the complaint. She went before the commission in that case appointed by us, and testified unequivocally that she was not a stockholder in the fuel company.

The final order and discharge entered April 16, 1913, provided that Fawcett should not be bound thereby unless she voluntarily and of her own accord released all rights she might have under the decree of April 24, 1911. Thereupon the next day she made, signed, acknowledged and entered of record her acquittance, *inter alia* as follows:

The undersigned, Pauline M. Fawcett, plaintiff, hereby releases and discharges the defendants and each of them from all demands, claims or benefits, accrued or to accrue, under and by virtue of the decree made and entered April 24, 1911; this acquittance being in accordance with and embracing my confession of error in the Supreme Court of the State of Colorado."

The receiver of Fawcett is in no better position than Fawcett, and to allow a judgment to stand upon the face of this record, based upon the theory that Fawcett is still the owner of this stock, would reflect but little credit upon the courts.

The erroneous finding of the court that Fawcett owned the stock, naturally caused it to reach another erroneous conclusion, that she was entitled as a stockholder, to notice of the stockholders' meeting held April 29, 1912, for the purpose of directing the officers of the fuel company to make and acknowledge the acquittance, and that all the stock was not present and voting at this meeting. The decree setting aside the acquittance of the fuel company is based upon the erroneous finding that this was not a legal stockholders' meeting and therefore was not the action of the fuel company, because Fawcett was the owner of 5,000 shares of stock April 29, 1912, when the meeting was held.

The complaint alleged generally, fraud and false pretenses which induced Fawcett to sign the acquittance. The allegations and proof required with regard to false representations inducing another to act, are well understood, and need not be repeated. This case comes far short of the mark both in the pleading and proof. Also the allegation of fraud and misrepresentation practiced upon the court to induce it to sign the final decree of April 16, 1913, is a mere general allegation of which there was no proof whatever. The record shows that the court was familiar with the situation and fully protected the rights of all parties; that the final order of court was freely and voluntarily complied with in good faith by all the parties, including Fawcett, and the judgment in the case at bar, up-

setting all that had been done, can not be permitted to stand.

The judgment is reversed and the cause remanded with directions to the lower court to dismiss the complaint.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 9091.

COLLARD v. HOHNSTEIN.

1. STATUTE—*Remedy Prescribed—When Exclusive.* To have this effect the statute must expressly or by necessary implication, abrogate the right to an action given by the common law, a former statute.
2. —— *Exempt Property—Action for Unlawful Levy.* The property owner is not restricted to the proceeding prescribed by Rev. Stat. secs. 3782, 3783, but may have his action for treble damages, under Rev. Stat. sec. 3634.

Error to Logan District Court, Hon. Haslett P. Burke, Judge.

Mr. W. L. HAYS, for plaintiff in error.

Messrs. MUNSON, KEATING & MUNSON, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an action brought under section 3634, R. S. 1908, for treble damages for the alleged unlawful seizure, under process, by a constable, of property claimed to be exempt from execution sale. Verdict and judgment were for plaintiff. Defendant assigns error and brings the judgment here for review.

The sole question is whether the trial court had jurisdiction to hear and determine the case. The theory of plaintiff in error is that no action for the wrongful levy of an attachment writ will lie against a constable making such levy, and that the only remedy open is under sections 3782 and 3783, R. S. 1908, providing for a hearing before a justice of the peace to determine ownership, or the ex-

emption from process of property attached. It is urged that these statutory remedies are exclusive.

To deprive plaintiff of his common law right of action it is essential that it affirmatively appear that the statutes themselves, either directly or by necessary implication, abrogate such right.

In *Madera v. Holdridge,* 4 Colo. App. 126, 35 Pac. 52, this question is indirectly determined. That was an action for damages for seizure of exempt property upon a writ of attachment out of a justice court, and the question was whether the return of the property had been made within a reasonable time. The Appellate Court, in holding that this was a question for the jury, tacitly acknowledged the right of plaintiff to maintain the action independent of sections 3782 and 3783, *supra.*

Harrington v. Smith, 14 Colo. 376, 23 Pac. 331, 20 Am. St. 272, was a similar action against a constable for unlawful seizure of exempt property. This court there held in effect that a plaintiff is not necessarily confined to the statutory remedy.

The Court of Appeals, in *Duncan v. Burchinell,* 14 Colo. App. 471, 61 Pac. 61, was another case in which the plaintiff was permitted to recover in an action for damages for alleged wrongful levy upon exempt property under an attachment writ.

It appears, therefore, that the statutory remedy never has been considered exclusive under a state of facts such as are here disclosed. Section 3782 and 3783, *supra,* do not purport to abolish the other remedies which a litigant had at common law. The rule is that a remedy provided by one statute does not abolish that given by another, or by common law, unless specifically so provided. *Colo. Milling & Elevator Co. v. Mitchell,* 26 Colo. 284, 58 Pac. 28. This principal was applied in *Lilly v. Tuttle,* 52 Colo. 141, 117 Pac 896, Ann Cas. 1913 D, 196, where it was held that the Code provisions concerning arbitration did not affect the common law remedy. The situation is analagous to a case where the property of a third person has been taken under execution. In such cases there never has been any doubt

that the third party might either replevin the property or seek relief under the Code.

Upon principle and authority there is no sound legal or logical reason for denying plaintiff a similar election of remedy. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9237.

THE INDUSTRIAL COMMISSION ET AL. *v.* AETNA LIFE INSURANCE COMPANY.

1. WORKMEN'S COMPENSATION ACT—*Construction.* Statutes of this character are to be liberally construed, to the end that their beneficent purpose may be accomplished.
2. —— *When is Employee in the Course of his Employment.* One employed by a building company as foreman, in charge of the erection of certain buildings at different localities in several of the western states, had completed one of these buildings and had taken passage with a friend in an auto car, to go to another locality, in a different state, where he was to proceed with another building. He came to his death from the accidental overturning of the auto car. *Held* that he was "performing service arising out of and in the course of his employment," within the meaning of the statute. (Laws 1915 c. 179, sec. 8.) *Industrial Commission v. Anderson*, 169 Pac. 135, distinguished.
3. ——STATUTE—*Extra Territorial Effect.* The law of the place of contract controls the rights and liabilities both of the employer and employee. Both being citizens of Colorado and residing here, and the contract of employment having been made here, *held* that the death of the employee, occurring in another state, while there upon the affairs of the master, and under his orders, entitled his widow and child to compensation.

Error to the Denver District Court, Hon. Harlet P. Burke, Judge.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. JOHN L. SCHWEIGERT, Assistant Attorney General, and Mr. WALTER E. SCHWED, for plaintiff in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, and Mr. JOHN P. AKOLT, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is an appeal by The Industrial Commission of the state, from a judgment of the District Court vacating an award by that Commission under the Workmen's Compensation statute. The claim for compensation is by Cora M. Lynch, widow, and Clyde and Orville Lynch, dependent children of Charles E. Lynch, deceased.

The cause was tried upon an agreed statement of facts both before the Commission and the District Court, as follows:

"Charles E. Lynch, from a time prior to August 1, 1915, when the Workmen's Compensation Act became effective, and until the time of his death, on September 14, 1915, was an employee of The C. E. Walker Contracting Company. Mr. Lynch was a resident of the State of Colorado, and The C. E. Walker Contracting Company was and is a Colorado Corporation, with its principal office in the City and County of Denver. The contract whereby Mr. Lynch was originally employed or hired was made in the State of Colorado.

The C. E. Walker Contracting Company has a general contract with The Mountain States Telephone & Telegraph Company for the construction of telephone exchange buildings, at different points in the states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico. Lynch was employed to act as foreman in connection with the construction of these buildings.

On September 13, 1916, Lynch had just completed his work as foreman, in connection with the erection of a telephone exchange at Afton, in the state of Wyoming. He intended to leave Afton that day by the regular stage running to Montpelier, Idaho, where he was to undertake the work of foreman on a similar job. For some reason, however, he missed the stage and was invited to ride to Cokeville, Wyoming, in a Ford automobile and there catch a

train for Montpelier, the only way out of Afton. The automobile was privately owned and operated by an acquaintance residing at Afton, and he was invited to take the trip as a guest, no payment of compensation being expected. In addition to the owner of the machine and Mr. Lynch, there were two other passengers. When the machine approached Cokeville it skidded for some reason and turned absolutely over. When the car was lifted Mr. Lynch was unconscious. He was taken to the hospital at Montpelier on the first train, and there operated on. It developed that the base of his skull was fractured, and that nothing could be done for him. He died approximately twenty-four hours later, and on the 14th day of September, 1915. The accident which resulted in his death happened in the State of Wyoming.

That the average weekly wage of the said Lynch exceeded $16.00."

The defendant in error, having complied with the statute, in that respect admits its liability, if the reward was properly allowed under the Workmen's Compensation statute.

The judgment of the trial court is based on the conclusion that the facts do not support an award by the commission to the dependents of the deceased workman.

It is contended by defendant in error that the judgment should be sustained for the reasons, (a) that it does not appear that the accident arose out of and in the course of the employment, and (b) that the Workmen's Compensation Act of this state has no extra-territorial effect.

As relates to the first question raised, section 8, chapter 179, Laws 1915, provides:

"The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury or death accidentally sustained on and after August 1, 1915, shall obtain in all cases where the following conditions concur:

1. Where, at the time of the accident, the employee is performing service arising out of and in the course of his employment.

2. Where, at the time of the accident, the employee is performing service arising out of and in the course of his employment.

3. Where the injury is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted or intentionally inflicted by another."

The agreed statement limits the inquiry to that of whether or not under the law applicable, is this a case, where the injury was proximately caused by accident arising out of and in the course of his employment. At the time of his employment and at the time of the accident and death Lynch was a resident of the State of Colorado. The employment was to act as foreman for his employer in the construction of telephone exchange buildings for a telephone company, operating and erecting buildings in the several states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona and New Mexico.

To do this he must necessarily proceed from one point to another within these several states, and it must be assumed that he was to so proceed to and from such places as directed by his employer. He had just completed a duty within his employment at the town of Afton, Wyoming. He was proceeding under direction of his employer to the town of Montpelier in the state of Idaho, to perform a like duty. He was proceeding to the railroad station at Cokeville by automobile, the only way provided to reach the railroad station. There is no indication of any unnecessary loss or waste of time. Was he then acting in the course of his employment at the time of the accident.

Workmen's Compensation laws are comparatively new in the United States, and it is but natural that in this early period of judicial interpretation there should be divergent views as between the courts of the several states in some respects. The difficulty in this particular, seems to have arisen because of an apparent failure in some cases to clearly recognize the distinction in principles to be applied in such cases, and those applicable in negligence cases.

Under the principle of compensation awarded and commanded by the state, the question of negligence is in no sense involved. The validity of these statutes in so far has been determined by our courts, rests upon the basis of a proper exercise of the police power, as being in the interest of the public welfare. The purpose primarily is to relieve the public of the burden of supporting injured workmen, and their dependents, who may by reason of such injuries become objects of charity. The expense is to be treated as an additional cost of the operation of business, and under our statute is collected by the state from the employer in the nature of premiums, based upon the number of employes, wages paid, the character of employment and other consideration calculated to establish a reasonable charge for accident insurance.

This fund is designated as an insurance fund, from which the commission is required to make allowances to the workman and his dependents according to nature and character of the injury as provided and detailed in the statute.

It is quite apparent that it was not the purpose of the law to hold the right of compensation to such strict construction of the term "scope of employment," as in cases of tort where the employer may be held to compensation for his own negligence. In fact the term "in the course of employment," used in the statute, may well be said to differ in meaning from the term "scope of employment" as used in judicial determination in negligence cases.

In truth the payment of compensation does not fall upon the employer at all, but is to be charged to the expense of operation of the business, and is therefore made a part of the cost of the product, as much so as the cost of labor, materials and other actual expenses of operation, so that this expense of insurance becomes ultimately, and in fact a part of the price to the purchaser of the product and to that extent is paid by the public.

Our courts are in agreement that these acts should be broadly and liberally construed, to the end that their beneficient intent and purpose may be reasonably accomplished.

Upon this point it was said in *Zappala v. Industrial Ins. Com.*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916 A 295:

"In construing the language of the act, we must have in mind the evident purpose and intent of the act to provide compensation for workmen injured in hazardous undertakings reaching 'every injury sustained by a workman engaged in any such industry; and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received.' *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, and that the act should be liberally interpreted, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted even to the inclusion of cases within the reason although outside the letter of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees regardless of the cause of the injury. *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685," [L. R. A. 1916 A 358, Ann. Cas. 1915 D, 154].

Construing a statute similar to our own, it was said in *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1:

"The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seaman on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, and probably those subject to the federal employers' liability act. It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the employers' liability act had failed to accomplish that measure of protection against injuries and of relief in case of accident which is was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held

out to facilitate its voluntary acceptance by both employers and employes. It is manifest from the tenor of the whole act that its general adoption and use throughout the Commonwealth by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design."

The English Workmen's Compensation acts were adopted some years prior to that of any American statute on that subject, and the question now under consideration has been frequently construed by the English courts. The subject is reviewed at length by Mr. Chartres in his work on Judicial Interpretations of the Law Relating to Workmen's Compensation, 1915, beginning at page 137.

It seems to be generally held by the English courts that employment is not necessarily synchronous with contract of service, but that in all those things that he is entitled to do by virtue of his contract, he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. The author quotes among many other authorities, the language of Farwell L. J., in *Gane v. Norton Hill Colliery Co.*, (1909) 2 K. B. 544, which seems to be a fair statement of the English law:

"It is well settled that the employment is not confined to the actual working whether in a pit or at any other trade, in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract or employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employers' premises, passing and repassing for all legitimate purposes connected with his work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service as in the cases of *Cremins v. Guest, Keen & Nettlefolds* (p. 151, post) and *Holmes v. G. N. Railway Co.* (*ibid.*), All

those things that he is entitled to do by virtue of his contract he is for the purposes of the act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make reasonable use of the facilities and rights which are given to him in this way."

In the case at bar it was an essential part of his employment that the deceased should travel from the place where he had installed one plant to the place where he was to install another. It is also clear that he adopted a reasonable, and apparently the only facility for such travel under the circumstances, and as safe as any other that may have been available.

No case is cited that adopts a different rule, and we know of none, as applied to workmen's compensation statutes.

It is urged that the case of *Industrial Commission v. Anderson,* by this court, 169 Pac. 135, supports the contention of defendant in error. We do not think so. In that case Anderson was permitted to do his work either at his home or at his employers place of business. This was a matter of choice with him, and not either a direction or a requirement of his employment. He was going from one of these places to the other. The case was decided upon this principle. In this case the contract of employment impliedly, at least, required the deceased to proceed from the one place of employment to another. He was traveling on his employer's business, which by his contract he was bound to do, and for which it is reasonably assumed he was being paid to do, for it is not to be presumed that he was under the circumstances, traveling such distances upon his own time. It may be safely said that he was doing that which was incidental to the character of the business, and not independent of the relation of master and servant, but rather had its origin in a risk connected with the employment.

This distinction is well supported by authority. In the case of *Terlecki v. Strauss,* 85 N. J. Law 454, 89 Atl. 1023, where a factory employe quit work at her machine shortly

before noon, and was in accordance with custom combing particles of wool out of her hair preparatory to going home, and at a point thirty-two feet from her machine, when her hair was caught in other machinery and she was seriously injured, it was held that the accident arose out of and in the course of her employment.

In *Kunze v. Detroit Shade Tree Co.*, 192 Mich. 435, 158 N. W. 851, L. R. A. 1917 A, 252, involving an award by the Industrial Accident Board, under a state of facts as follows:

"Having been with the defendant company for about two years, on July 18, 1914, he was employed as a foreman, and in the course of this employment it was his duty to go from job to job about the city. On the day aforementioned, he had inspected a job on Virginia Park, a street in the city of Detroit, and, having completed this inspection at about 9 o'clock in the morning, he left the work in charge of another employe and started east on Virginia Park to the intersection of Woodward avenue, where it is to be reasonably inferred from the evidence he was about to take a car to inspect another job north of Virginia Park at the corner of Josephine avenue and Woodward avenue; and it also appears that there was another job for inspection at the corner of Mt. Vernon and John R. Streets, which was also north of Virginia Park. While at the intersection of Virginia Park and Woodward avenue, he was knocked down by an automobile, seriously injured, and died the following day."

It was held that the accident arose out of and in the course of the employment.

In the very interesting case of *Foley v. Home Rubber Co.*, 89 N. J. Law 474, 99 Atl. 624, the employe lost his life in the sinking of the Lusitania, while engaged as a traveling salesman and enroute to visit his employer's London office, and it was held that the accident arose out of and in the course of his employment. The court said:

"If the Lusitania had been lost through a collision, fire, or storm at sea, resulting in the death of Foley, it would,

under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment. Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the Lusitania was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's employment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag carrying contrabrand of war subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her, might result."

In the very recent English case of *White v. W. & T. Avery, Limited,* Vol 53, Scottish Law Reporter, 122, and under the following facts:

"A machine-fitter, whose duty it was to go around to various places where the employers had erected or executed repairs upon weighing-machines, was engaged in inspecting railway weighing-machines. To one of the machines he proceeded to walk upon a road rendered slippery by frost after rain. While endeavoring to avoid a vehicle he slipped and fell, breaking his wrist."

It was held, following an unbroken line of English decisions, that the injury was caused by accident arising out of, as well as in the course of, the employment. This was under the workmen's compensation law.

The case of *Summers v. California Iron Works and London & Lancashire Indemnity Co;* First Appellate District of California, reported in 5 Decisions Industrial Accident Commission, 386, is almost parallel to the one at bar. It was there held that an injury sustained by a millwright while journeying in an automobile belonging to his son, to a place where he had been directed to go by his employer to install machinery, is an injury arising out of his em-

ployment within the workmen's compensation act, where it is shown that his employment was in the nature of a traveling employment, requiring him to go to any particular place where a contract for the installation of machinery had been obtained.

It was there said:

"On behalf of the respondent herein it is conceded that the general rule governing ordinary cases arising under the Workmen's Compensation Act is that for which the petitioner herein contends; but the respondent herein argues, we think convincingly, that the facts of this case bring it within the exceptions to the general rule. The exceptional cases are those wherein the employment itself is one in which the employee is required to travel from place to place at the will of the employer, and hence where the risks of such travel are directly incident to the employment itself and hence wherein the accident occurring by reason of such risk is one arising out of the employment, and therefore a proper subject of compensation under the Employers' Liability Act." Citing *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149; *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916 A, 327.

We now come to the question as to whether or not the Colorado workmen's compensation act has what is termed extra-territorial effect. It is contended that there can be no recovery for the reason that the accident occurred in the state of Wyoming, notwithstanding the contract was made in Colorado; that both parties to it at all times resided in Colorado; and that the services under it were to be performed partially at least in this state.

Counsel concede that it is within the legislative power to give extra-territorial effect by express provision, but contend that in the absence of such expressed purpose it must be conclusively presumed that general words were intended to be limited in their application to the territorial jurisdiction of the legislature using them.

The *William S. Gould* case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 194-D 372, is cited to support this conten-

tion. This case construed the statute of Massachusetts, which in respect to the question at issue, is like the Colorado law, in that the statute is voluntary, and that it does not in express terms provide for compensation in case of accidents occuring without the state. It was there held that the statute does not apply.

This decision was perhaps the first involving the question by an Appellate Court in this country, and the doctrine there announced has not generally been followed, but on the contrary has been very generally disapproved by courts of last report.

The Gould case was followed and approved by Mr. Bradbury in the first edition of his work on Workmen's Compensation and State Insurance, but in the second edition of this work the author recedes from this position, and announces his belief that the doctrine which must be finally established will be in effect that the law of the place where a contract of employment is made, will govern the rights and liabilities of employes and employers, to claim and to pay compensation.

It will be noted that in the Gould case the court relied largely on the English cases, which was in fact the only authority it had, but the author quite clearly points out the inapplicability of these authorities as follows:

"In Great Britain the conditions are entirely different from those existing in the American States, although the decisions hereinbefore cited arose in relation to accidents which happened entirely outside the United Kingdom. True, the accidents in one of the cases, at least, happened on a British vessel. Under the decisions in the cases of *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, and *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430, it might be that even the Massachusetts Act would be held to apply in similar circumstances. In this respect the British decisions are in conflict with adjudications of our Federal Supreme Court. But the principal difference in the conditions between Great Britain and the United States is that in the former the Compensation Act applies to the whole of the

territory of the United Kingdom. Thus, if an employer in London sends an employe to Scotland, Wales or Ireland and he is there injured, the Compensation Act applies. While under the doctrine of *Gould v. Sturtevant,* supra, if a Massachusetts employer should send a workman to New York, the Massachusetts Act would have no application whatsoever and the employe would have no claim whatsoever on his employer, unless he could base it on negligence. This, of course, would be assuming there was no compensation law in New York.

Therefore, partially receding from the position taken in the first edition of this work, although that position has been sustained by eminent authority, it is believed that the doctrine which must be established finally will be, in effect, that the law of the place where a contract of employment is made will govern the rights and liabilities of employes and employers to claim and to pay compensation." Bradbury's Workman's Compensation and State Insurance, Vol. 1, 2nd Ed. 55.

The later authorities in this country base the conclusion chiefly on the proposition that under voluntary compensation statutes such as ours, the cause of action of petitioner is *ex contractu,* and that the *lex loci contractus* govern the construction of the contract and determines the legal obligations arising under it.

The provisions of the compensation act are to be construed as written into the contract and therefore a part of it. The reasonings of these cases is well stated in *Deeny v. Wright & Cobb Lighterage Co.,* 36 N. J. Law J. 121, to be:

"It appears that there is an implied contract to compensate for injuries arising out of and in the course of the employment, and under it all other methods and rights to any other form of compensation are relinquished. The statute can have no extra-territorial effect, but it can require a contract to be made by two parties to a hiring that the contract shall have an extra-territorial effect. The contract is binding on the employe himself and upon the

employer, and it is conclusively presumed that the parties have accepted the provisions of Section II and have agreed to be bound thereby. The method of termination of the contract is provided for in paragraph 10. It would seem that the reasonable construction of the statute is that it writes into the contract of employment certain additional terms. The cause of action of petitioner is *ex contractu.* The *lex loci contractus* governs the construction of the contract and determines the legal obligations arising from it. 9 Cyc. 664. That the cause of action is *ex contractu,* see *Sexton v. The Newark District Telegraph Company,* 34 N. J. Law Journal 368, and 35 N. J. Law Journal 8; *Icelsborg v. Miller,* 35 N. J. Law Journal 202.

The English cases cited in Bradbury's book are not precedents, because a claim under the English act is *ex delicto.*

The objects of our act are to protect the citizens and inhabitants of New Jersey. It is based upon the proposition that the inherent risks of an employment should, in justice, be placed upon the shoulders of the employer, who can protect himself by an addition to the price of his product, and so cause the burden ultimately to fall upon the consumer; that indemnity to an injured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that under our former system the loss fell immediately upon the employe, who is almost invariably unable to bear it, and, therefore, ultimately upon the community, which is taxed for the support of the indigent, and that our former system was uncertain, unscientific and wasteful and fostered a spirit of antagonism between employer and employe, which it is to the interest of the state to remove.

The contract here was to be partly performed in New York and partly in New Jersey. The law of New York, the admiralty law or the Act of New Jersey applies. The parties chose the law of New Jersey by making the contract here without giving the notice required by the act

to come under Section 1. Shall the public policy of New Jersey to place the burden on the industry be carried into effect, or shall the sole loss fall on the petitioner in violation of the law of his state? It would be contrary to public policy to place the burden on the employe under the facts in the case."

The principle is concisely and curtly stated in *Rounsaville v. Central R. R. Co.*, 87 N. J. Law 371, 94 Atl. 392, in the following language:

"We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance."

In the case of *Grinnell v. Wilkinson*, 39 R. I. 447, 98 Atl. 103, L. R. A. 1917 B. 767, the court entered upon a most elaborate review of the authorities and fully answers many contentions in the brief of counsel in this case, concerning particular expressions in our act quite similar to those found in the Rhode Island act, which it was there urged as in this case, lends support to the construction contended for. The court concluded as follows:

"The latest case which has come to our attention is *Post v. Burger & Gohlke et al.*, 216 N. Y. 544, 111 N. E. 351 (January, 1916), a New York case, where the same question arose under the Workmen's Compensation Act of New York. The case follows substantially the same line of argument and arrives at the same conclusion as the cases of *Kennerson v. Thames Towboat Co.*, supra, and *Rounsaville v. Central R. Co.*, supra, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916 A. 436, both of which it cites with approval. See also *Deeny v. Wright & Cobb, etc., Co.*, 36 N. J. Law J. 121; 1 Bradbury Workmen's Compensation, pp. 50, 52 *et seq.*, cited with approval in the *Kennerson Case*, supra, L. R. A. 1916 A, 436, and in the *Post Case*, supra, 216 N.

Y. 544, 111 N. E. 354, Ann. Cas. 1916 B. 158.

We are of the opinion that the reasoning of the cases above cited from New York, New Jersey and Connecticut is quite applicable to the case at bar; that under the Workmen's Compensation Act of Rhode Island the relation of employer and employe is contractual and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, and in view of the purpose, scope and character of the act, it should be construed and held to include injuries arising out of the state, as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion."

The New York statute in the respect we are considering is not materially different from that of Colorado, and it was held in the case of *Matter of Post v. Burger & Gohlke,* 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916 B. 158, after an extensive review of the authorities, that:

"The act, taken as a whole, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employe, general in its terms and unlimited as to territory, that the employer shall pay, as provided by the act, for a disability or the death of the employe as therein stated. The duty under the statute defines the terms of the contract.

Where, therefore, a resident of this state, employed by a corporation engaged in business in this state, is sent by his employer to perform work in another state, away from the plant of the employer, but under the employer's express direction, and while engaged therein is injured, he is entitled to compensation when in other respects he comes within the provisions of the law."

The difficulties and injustice that may arise in case the law shall be held to apply to accidents occurring within the state only are forcibly stated in the well reasoned case of *Kennerson v. Thames Towboat Co.,* 89 Conn. 367, 94 Atl. 372, L. R. A. 1916 A. 1436, where it was said:

"The remedy provided by our Compensation Act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost, in the case of every injury not caused by the wilful and serious misconduct or intoxication of the injured employee, to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer, too, should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the state, and the employee or his dependents may not collect the same.

Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in, and what part out of the state, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The state boundary is not the limit of very many businesses. To subject them to the laws of the many

jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater difficulties than under the old system.

Equally hard will it prove to the employee, since he must pursue his remedy in the state of the accident, or the Federal court, applying that state's law, and thus he may be brought under any one of many different compensation acts, with whose provisions he can not hope to be familiar; some acts contractual in character, some compulsory, some optional, and some *ex delicto;* and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities.

Is it reasonable to infer that our legislature, inaugurating a new system based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system, and cast a multitude of employers and employees into a maelstrom of trouble, uncertainty and liability? On the other hand, is it not reasonable to infer that the legislature, having bottomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed to have known that the contract, and not the place of injury, would govern the recovery. Such a construction of the act would lift insuperable burdens from industry and commerce and workmen, and give to each his course and the ascertained fruits of the contract of his will."

Continuing, the court said:

"Where, as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign jurisdiction. 1 Bradbury's Workmen's Compensation, (2d Ed.) p. 52. If it should be necessary to so rule, no hardship would result; the parties in interest would be relegated to the place where they had elected to make their contract and no questions

of conflict of laws could arise. At the base of this question is the character of the compensation. Mr. Bradbury, repudiating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the state. We think his later conclusion sound, and one which will prove beneficial alike to employer and employee."

Counsel, however, urge that Section 5 of the Act of 1915, by the use of the words, "for a personal injury sustained within this state," supports the contention that compensation may be allowed for accidents occurring within the state only. The section deals only with negligence cases, not with compensation, and denies the defenses in such cases of assumed risk, the fellow servant rule, and contributory negligence.

The very purpose of the provision is to induce employers to accept the compensation law, in so denying such defenses in negligence cases. Beside, the act should be construed as a whole in the light of its purposes. It was held in the case of *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862, L. R. A. 1916 D. 637, where the compensation statute was seemingly limited to persons, "as shall have received injuries in this state," that it was a construction too narrow to hold that these words limited the right of compensation to injuries occurring within the state, in view of the objects and purposes of the act.

In the case at bar, if we are to determine, in the absence of any provision of the statute to the contrary, that the doctrine of *lex loci contractus* does not govern, it will be to destroy the very spirit and purpose of the law as it affects the employer, the employee and the public welfare.

If we assume that there are no workmen's compensation laws in the states where the deceased was to perform his services outside of Colorado, then there can be no recovery of compensation, notwithstanding all premiums sufficient to maintain the workers' accident insurance had been fully paid. On the other hand, if we are to assume that a

workmen's compensation law prevails in each of the seven states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona and New Mexico, then the employer must be compelled to comply with each statute and to pay the premiums required by the law of each state for the protection of the one employee, or approximately seven times the amount otherwise required.

If this were legally permissible, the expense would make it prohibitive. The result in this case must be that the employer has paid the full premium demanded by the state to insure his employee against accident; the employee has relied on the pledge of his state for the protection of himself and his dependents; his widow and children discover the whole arrangement to be a delusion and a snare, and find themselves without protection. Thus, the employer, the employee, his dependents and the public have all been deceived and cheated, because forsooth the accident occurred beyond the imaginary line that marks the boundary of the commonwealth, though it happened within the line of employment.

We can not assume that the legislature ever intended such an injustice and absurdity, in the absence of some clear and express provision in the statute to that effect, which we do not find.

The judgment is reversed with instruction to enter judgment confirming the award of the Industrial Commission theretofore allowed.

Judgment reversed.

En banc.

White, J., and Bailey, J., dissenting.

No. 9228.

THE PEOPLE *v.* HARDY.

CRIMINAL LAW—*Autrefois acquit.* Acquittal of a charge of forgery is no bar to an indictment for perjury, committed by the accused in his trial for the forgery.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Department.

Mr. WILLIAM E. FOLEY, district attorney, and Mr. T. E. MCINTYRE, assistant district attorney, for the people.

No appearance for defendant in error.

Opinion by Mr. Justice Teller:

The defendant in error was tried and acquitted of a charge of forgery, and afterwards was indicted for perjury, alleged to have been committed on the trial for forgery.

To this indictment he plead that the question of said perjury had been adjudicated on his trial for forgery; that the issue in both cases was the same, *i. e.*, was his evidence as to the making of the check alleged to have been raised by him true or false; that the verdict in his favor was an adjudication that his testimony was true; and hence he could not be found guilty of perjury for so testifying.

A demurrer to the plea was overruled, a replication to it was filed, and a demurrer to it sustained. Cause dismissed, and prisoner discharged.

The case is now here for review on the correctness of the rulings on the demurrers to the plea of former jeopardy, and to the replication. The question is this: Does the verdict in favor of defendant conclusively establish that the testimony of defendant on the trial for forgery is true; and so bar further inquiry on that point?

While the cases on the question are somewhat in conflict, we think the great weight of authority, and by far the better reasoning, answer the question in the negative. The plea shows that there was evidence offered on behalf of defendant other than his testimony, and that being so, it can not be said that all his testimony was determined to be true. Again the issue is not the same. In the one case it was: Did he commit such acts as amount to forgery in

law? In the other it is: Did he wilfully testify falsely to a material fact?

The allegation of the plea that the issue was the truthfulness of defendant's explanation is a mere conclusion, and not admitted by the demurrer. The jury may have rejected as untrue a part or the whole of defendant's testimony, and because of other evidence entertained a reasonable doubt of his guilt.

Again, when tried on the charge of perjury, other evidence than that produced on the forgery trial may be introduced, and the charge fully sustained. Even if he did not in fact forge the check, conceivably he might commit perjury in order to insure an acquittal. The decisive point is, however, that the issues are not the same, and the determination of one does not necessarily determine the other. And so the cases hold. *Hutcherson v. State,* 33 Tex. Cr. 67, 24 S. W. 908; *State v. Cary,* 159 Ind. 504, 65 N. E. 527; *State v. Bevill,* 79 Kan. 524, 100 Pac. 476, 131 Am. St. Rep. 345, 17 Ann. Cas. 753; *People v. Albers,* 137 Mich. 678, 100 N. W. 908; *State v. Caywood,* 96 Iowa 367, 65 N. W. 385; *State v. Vandemark,* 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; *Schaller v. State,* 14 Mo. 502; *Mitchell v. State,* 140 Ala. 118, 37 South. 76, 103 Am. St. Rep. 17; and 30 Cyc. 1422.

A late case in Kentucky, *Teague v. Commonwealth,* 172 Ky. 665, 189 S. W. 908, L. R. A. 1917 B. 738, overrules two earlier cases in that state, and holds that an acquittal in the one case is not a bar to the other; and, in *Allen v. U. S.,* 194 Fed. 664, 114 C. C. A. 357, 39 L. R. A. (N. S.) 385, the court declined to follow *U. S. v. Butler,* 38 Fed. 498, which sustained the position of defendant in error. This leaves no substantial authority to sustain the rulings and judgment. The judgment is therefore reversed, and the cause remanded with directions for further proceedings in harmony with the views herein expressed.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 8544.

CONSUMERS' LEAGUE OF COLORADO *v.* COLORADO & SOUTHERN RAILWAY COMPANY ET AL.

1. PUBLIC UTILITIES COMMISSION—*Powers.* The Commission has no power to prescribe a charge for a service not to be rendered. It has nothing to do with commercial problems and policies.
2. —— *Railway—Switching Charges.* A rule eliminating all distinctions between shipments over the line of the carrier, and switching charges, prescribing a uniform rate for all cases, regardless of whether switching is performed or not, condemned.

Writ of Review to the Public Utilities Commission.

Mr. CARL WHITEHEAD, Mr. ALBERT L. VOGL, for complainant and plaintiff in error.

Mr. C. C. DORSEY, for Union Pacific R. R. Co.

Mr. E. E. WHITTED, for Colorado & Southern Railway Co. and Chicago, Burlington & Quincy Railroad Co.

Mr. E. N. CLARK, for the D. & R. G. R. R. Co.

Mr. Justice Scott delivered the opinion of the court:

There were two petitions filed by the complainant with The Public Utilities Commission of the state against the respondents, railroads. Both were heard together and are here presented on the same record for review.

It was alleged in the first petition:

"That defendants are, and each of them is a common carrier; that defendants, The Colorado & Southern Railway Company, Chicago, Burlington & Quincy Railroad Company, and Union Pacific Railroad Company, are common carriers engaged in the transportation of lignite coal from the coal field located in Boulder and Weld Counties, Colorado (being the coal fields generally known as and hereinafter referred to as the "Northern Fields") to Denver; that each of the defendants operate railway terminals in the City and County of Denver, and each of said defendants transports and delivers lignite coal from said Northern field over and upon the said terminals operated respectively

by it; that as such common carriers, and in respect to such traffic, defendants are, and each of them is, subject to the provisions of chapter 5 of the Session Laws of Colorado for 1910.

Third: That defendants, The Colorado & Southern Railway Company, Chicago, Burlington & Quincy Railroad Company, and Union Pacific Railroad Company, have each recently published tariffs effective July 1st, 1914, said tariffs being respectively numbered Supplement No. 11 to C. R. C. No. 261, Supplement No. 29 to C. R. C. No. 33, and tariff C. R. C. No. 51. That in and by said tariffs each of said defendants have published and established rates of 75, 70 and 60 cents per ton for the transportation of lump, mine run and slack lignite coal, respectively, in car load lots, from said Northern fields to Denver, including delivery upon the Denver terminals of any of the defendants other than the defendant upon whose line the traffic originated."

It was then alleged that the said rates of 75, 70 and 60 cents for such transportation are unjust, unreasonable and excessive, and subject the citizens and consumers of the City of Denver, and the traffic of said Northern field to undue and unreasonable prejudice and disadvantage, and is in violation of sections 3 and 5 of chapter 5 of the Session Laws of 1910, and that a just and reasonable rate, including a delivery to one or the other of the respondents, upon the interchange track with such respondents, would be 40 cents per ton in car load lots. That the respondent, the Colorado & Southern Railway Company, is, and for several years last past has been, transporting all grades of lignite coal in car load lots from the mines in said Northern fields, located upon its line, and delivering the same to the interchange track between it and the Rock Island road for 40 cents per ton.

It is further alleged that a maximum rate of $3.00 per car is a reasonable, just and compensatory rate for respondents, and each of them, to charge for switching service involved in delivering a car load of said lignite coal to any public track, spur, private siding, or industry track upon

its terminal, after such car has been delivered to it by one of the other respondents.

The second petition alleged:

"Third: That all of the defendants herein were parties to two certain proceedings before this Commission, being cases numbered 22 and 34 by this Commission, and generally known as The Consumers' League and the Garwood cases, respectively. That in each of said cases this Commission was petitioned to determine what would constitute reasonable rates for the transportation described in paragraph 'second' hereof, and in each of said cases determined that 55, 50 and 45 cents per ton upon lump, mine run and slack coal, respectively, would constitute reasonable rates for transportation of lignite coal from the Northern Colorado coal fields aforesaid to Denver; that the decision of this Commission in the Consumers' League case has been expressly approved and affirmed by the District Court of the City and County of Denver, and no ruling has ever been made by any court adverse to the decision of this Commission in the Garwood case.

Fourth: That in defiance of the aforesaid decisions of this Commission, and of the aforesaid decision of the District Court of the City and County of Denver in The Consumers' League case, defendants, acting through their respective attorneys and traffic officials, have entered into a conspiracy to disregard and defy said decisions, and to disregard and violate the provisions of said chapter 5 of the Session Laws of Colorado for 1910, and as a part of and in pursuance of said conspiracy, defendants, The Colorado & Southern Railway Company, published and issued its tariff Supplement No. 11 to C. R. C. No. 261, and defendant, the Chicago, Burlington & Quincy Railroad Company, issued its tariff Supplement No. 29 to C. R. C. No. 33, and defendant, the Union Pacific Railroad Company, issued its tariff C. R. C. No. 51, all of said tariffs being made effective July 1st, 1914; that each defendant in its aforesaid tariff published rates of 55, 50 and 45 cents per ton for the transportation of lump, mine run and slack lignite coal, re-

spectively, in car load lots, from the mines in said Northern Colorado coal fields to Denver, when billed direct from said mines for delivery at the public team tracks in Denver of the defendant upon whose lines the coal originated, and when so delivered, and in and by said tariffs defendants, and each of them, have published rates of 75, 70 and 60 cents per ton on lump, mine run and slack coal, respectively, in car load lots, when transported from said mines in said Northern Colorado coal fields and delivered in Denver upon the spurs, private sidings and industry tracks of the carrier upon whose line the coal originated; that defendant, the Union Pacific Railroad Company, in its tariff aforesaid, in order to deceive and mislead the public, and to conceal its part in the conspiracy aforesaid, and in an attempt to discredit this Commission, has caused to be prominently printed upon its tariff the statement, 'Rates named herein to Denver and Greeley are established in compliance with orders of the State Railroad Commission of Colorado;' that in so far as said statement refers to the 75, 70 and 60-cent rates aforesaid, complainant alleges such statement is wantonly and maliciously misleading, as this Commission has never ordered or approved said rates in any proceeding whatsoever.

Fifth: Petitioner alleges that the aforesaid rates of 75, 70 and 60 cents per ton, respectively, on lump, mine run and slack lignite coal, in car load lots, for the transportation thereof from said Northern Colorado coal fields to Denver, including delivery upon a spur, private siding or industry track of the carrier upon whose line the traffic originated, are, and each of them is, unjust, unreasonable and excessive, and in violation of the provisions of section 3 of the aforesaid chapter 5 of the Session Laws of Colorado for 1910."

There are other allegations, but the foregoing involves all that is necessary to consider.

The Public Utility Commission, in its findings, recites that in a former proceeding between the same parties, and involving the same questions under the Railroad Commis-

sion Act of 1910, the District Court of the City and County of Denver, upon an appeal from the order and findings of the Railroad Commission, and on the 2nd day of May, 1914, sustained the Commission in fixing the rates from the Northern coal field to any point on the line of the carrier on which the shipment originated, at 55, 50 and 45 cents, respectively, for lump coal, mine run and slack, and held such rates to be reasonable, but held that switching charges were a separate and distinct charge, not involved in the rate fixed. That switching was a different service, for which a separate but reasonable charge must be made.

Afterward the respondents filed their schedule of rates, which include, without distinction, and as a whole, switching charges in all cases, whether such services were rendered or not. It is this schedule of rates of which complaint is made, and which were sustained by the Commission in this case, and now before us for review.

It is clear from the findings of the Commission that the rule adopted, eliminating all distinction as between shipments on the line of the carrier, and switching charges, and making a uniform rate in all cases, regardless of whether or not a switching service was rendered, was based upon the notion of the Commission as to commercial considerations, and not upon transportation considerations, with which alone the Commission has the power to deal. This holding is without legal precedent and has been uniformly held to be invalid.

Judge Perry, in a very carefully considered opinion in the case when before him, has clearly and aptly stated the law on the subject as follows:

"Every charge for transportation comprehends compensation for initial terminal services, for haulage services and for final terminal services. In fixing a rate, all incidental terminal services, that is to say all terminal services which appertain to the traffic as a whole, must be considered, and the rate must include and must be understood to include these incidental terminal services. In fixing a rate, neither the carrier nor the Commission has the right to consider

any extra terminal services, that is to say terminal services which do not appertain to the traffic as a whole, but which are to be rendered in connection with certain parts of the traffic only, and as occasion may from time to time require. Neither the carrier nor the Commission may fix a rate which will include these extra terminal services. A rate fixed either by the carrier or Commission is understood to mean simply for the haulage services, including the incidental and excluding the extra terminal services.

The carriers were under no obligation to deliver this coal except on their own tracks, respectively. If the coal, after reaching Denver, had to be transferred to the track of a second carrier, the shipper or consignee could be obliged to pay for this transfer, either directly to the second carrier, or to reimburse the first carrier for making or pay for the transfer; or, in railroad parlance, 'for absorbing the switching.'

In fixing the rates in this case, the Commission simply determined what would be a reasonable charge for the line haul, including, of course, charges for incidental terminal services, and there is nothing in the order set out in paragraph 3, *supra,* nor in the law, which prevented the carriers from making special charges for storage, reconsignments, absorbing switching and other extra terminal services, and that the carriers understood that this is the meaning of the statute and that there was nothing in the order of the Commission to the contrary is proven by the fact that they have subsequently made special schedules covering some of the extra terminal services above mentioned. It was practically conceded at the trial that the rates fixed by the Commission would be reasonable if they did not preclude the carriers from collecting for these extra terminal services."

An examination of the following cases by the Interstate Commission, and court decisions, discloses well reasoned and uniform support of the conclusions reached by Judge Perry. *Associated Jobbers v. A., T. & S. F. Ry. Co.,* 18 Interst. Com. Com'n R. 310, affirmed by the Supreme Court

of the United States in 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319; *Lanning-Harris Coal & Grain Co. v. A., T. & S. F. Ry. Co.*, 12 Interst. Com. Com'n R. 479; *A., T. & S. F. Ry. Co. v. I. C. C.*, (C. C.) 190 Fed. 591; *Southern Pacific Ry. Co. v. I. C. C.*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; *Utica Traffic Bureau v. N. Y., O. & W. Ry. Co.*, 18 Interst. Com. Com'n R. 168; *Waverly Oil Works v. Penn. Ry.*, 28 Interst. Com. Com'n R. 621; *Dixie Cotton Oil Co. v. St. L., I. M. & S. R. Co.*, 27 Interst. Com. Com'n R. 295; *Swift & Co. v. C. & A. Ry. Co.*, 16 Interst. Com. Com'n R. 426; *Grand Junction N. & F. Co. v. D. & R. G. Ry. Co.*, 2 Colo. P. U. C. 181.

No case has been cited to the contrary and we know of none. The Public Utility Commission has the power to fix rates for service performed, or to be performed, but it has no power to fix a charge for a service not to be rendered. In the respect we are considering, it may deal with transportation service only, and its view of commercial policies and problems can have no greater legal force than the view of any other like number of persons. The injustice and unreasonableness of the rate complained of is well illustrated by the facts presented.

The Colorado & Southern Railway Company, The Chicago, Burlington & Quincy Railroad Company, and The Union Pacific Railroad Company are the only carriers transporting coal from the Northern field to Denver. We assume that each has tracks and spurs with industries located within the city on its own line. Necessarily but little of the coal carried by any one of the three lines may be expected to be transferred to the line of another of the three, and therefore to that extent no switching service is rendered.

The effect of this is to increase the transportation rate for a line haul from fifteen to twenty cents per ton over that found by the Commission and the court in the former proceeding to be just and reasonable upon every car of coal not legitimately subject to a switching charge.

The recognized rule as to the rights and obligations of

American railroads applied to line hauls and to the furnishing terminal facilities is clearly stated in *Associated Jobbers v. A., T. & S. F. Ry. Co.*, supra, as follows:

"The American railroad rate has always been recognized as covering the full service which the carrier gives, in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. * * * The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line. The terminal charges referred to in section 6, and which must be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching and cartage. This construction of the act is borne out fully by its history, and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge. They treat a dependent spur as a part of their own depot, to which the published rate carries all freight. They have recognized the value of having industries located on their tracks and have competed, in proper and improper ways, to secure them as dependencies. They have, accordingly, given to such industries the same service that they give at their team tracks, treating the one as the substitute or equivalent of the other. If delivery is made at the team track the carrier must haul the car from the main line and place it on the team track. And so, if delivery is to be made at an industry, it must be conveyed from the main line to the industry. In the former, as in the latter case, there is an inter-terminal switching, and a placement of the car."

It was further said in that case:

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays

for team-track delivery, and does not receive it, but asks instead, and is given, a side-track delivery, which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

It is plain from the language of the order of the Commission in this case that its decision was influenced by considerations of commercial necessity rather than a determination of what are reasonable rates.

It was held in the case of *A., T. & S. F. Ry. Co. v. Interstate Commerce Commission,* (C. C.) 190 Fed. 591:

"The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely."

A switching charge upon and over lines other than the line of the initiating carrier is a separate and distinct service and may be charged only when such service is rendered.

Counsel for respondents assert, with abundant authority to support the assertion, that it was undoubtedly within the power of the Commission to group the rates on coal from the Northern field and to make the same rate over the several roads from the several mines in that field to Denver, and then argue that if it is right to group the rates from

the mines in that field to Denver, it is also proper to blanket the rates in Denver.

The distinction is, that a rate from the mine to Denver is one fixed for a single service, though distances may vary somewhat as between the several mines of a group to a common destination; while the switching as between the different lines in the city is an additional and distinct service, for which a charge may properly be made only in case such service is actually rendered.

There is no dispute as to the facts in this case and the consideration here of the order of the Commission involves a conclusion of law to be drawn from the conceded facts.

The order of the Commission complained of is vacated and set aside, with direction to the Utilities Commission to ascertain and fix reasonable rates for each such separate service to be rendered.

The judgment is reversed.

En banc.

Bailey, J., dissents.

White, J., not participating.

No. 8914.

DENVER TRAMWAY COMPANY *v.* ORBACH.

1. APPEAL AND ERROR—*Instructions Curing Error in Admission of Evidence.* An error in the admission of evidence may be cured by an instruction.

2. —— *What may be Assigned for Error.* Error cannot be assigned upon the refusal of an instruction which is in direct conflict with another requested by plaintiff in error.

3. NEGLIGENCE—*Imputed.* A policeman in obedience to a command of his superior officer, takes passage in an auto car, to answer a riot call. He had no voice in the appointment of the chauffeur and no control over him. The negligence of the chauffeur in driving at an intemperate speed is not imputed to the policeman.

4. —— *Questions for the Jury.* Whether the policeman, in such case, is negligent in not protesting at the furious course of the chauffeur is for the jury.

Error to Denver District Court, Hon. John A. Perry, Judge. Department.

Mr. GERALD HUGHES, Mr. HOWARD S. ROBERTSON, Mr. W. G. TEMPLE, for plaintiff in error.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. GEORGE O. MARRS, for defendant in error.

Opinion by Mr. Justice Teller:

The defendant in error obtained a judgment in an action for damages for personal injuries caused by a collision between an automobile, in which he was riding, and one of the street cars of plaintiff in error.

The parties will be designated as they were in the trial court.

The plaintiff was one of a party of policemen who were riding in a city automobile, driven by one Pickens, who was employed by the City of Denver as a chauffeur.

The policemen had been ordered by their superior officer to respond to a "riot call," and, upon said order, entered the automobile in question, and were responding to said call when the accident happened.

Of the large number of errors assigned, only two or three are asserted to be sufficient in themselves to justify a reversal of the judgment.

Error is assigned on the admission of an ordinance requiring the sounding of gongs on street cars when approaching a crossing, but, as the ground upon which the objection is based, *i. e.*, that there was no evidence from which it could be inferred that the sounding of the gong might have prevented the collision, is fully covered by instruction number 16, given at defendant's request, the error, if any, was cured.

The principal errors argued are in the court's refusal to give defendant's requested instruction number 11, and in giving instruction number 17.

These instructions differ only in that the latter submits to the jury the question whether or not the plaintiff was

guilty of negligence in not protesting to the driver against the rate of speed at which he was driving, if such rate were found to be reckless; while the instruction requested told the jury that, if they found that the automobile was driven recklessly and negligently, which fact was known or should have been known to the plaintiff, if he were in the exercise of due care, and that he made no protest, but acquiesced in said action of the driver, then, plaintiff could not recover, if the drivers' said negligence contributed to cause the collision. In other words, counsel contend that plaintiff should be held to have been negligent as a matter of law, while the court left it to the jury to determine from the facts in evidence whether or not he was negligent.

By requested instructions 15 and 20, the defendant asked the court to submit to the jury the question of plaintiff's contributory negligence in not protesting against the driving of the automobile at a dangerous rate of speed, and the modification of requested instruction 11 in instruction 17, as given, does no more than to add to number 11 what was asked in 15 and 20 to be submitted to the jury. Plaintiff in error is, therefore, hardly in a position to complain of instruction 17, or to urge that instruction 11 was not given, since the latter was in direct conflict with two other requested instructions.

Moreover, instruction 17 is proper under the circumstances of this case. There were several matters to be considered from which different inferences might reasonably be drawn by different persons, and that fact made it a question for the jury.

The cases cited to support the proposition that the negligence of the chauffeur is to be imputed to the plaintiff are not in point. They are based upon an entirely different state of facts, and involve questions of injury to persons riding in private vehicles.

In *C. & S. Ry. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700, on which counsel rely, this court, in terms, confined the discussion to passengers in private vehicles, and pointed out that negligence was to

be imputed to a passenger only in those exceptional cases in which "the injured person is in a position to exercise authority or control over the driver."

The imputation of negligence in cases of a "joint enterprise" has the same basis, it being properly assumed that the several parties to the enterprise will each have a voice in its management, and hence have the right to exercise control over a driver, when the parties are traveling in furtherance of the enterprise. Each is in effect the agent of the others in the line of their undertaking.

Here there was no such community of interest as to make any member of the party the agent of another, nor did the policemen have any control over the chauffeur. They were acting in the line of their official duty, and the enterprise was one in which the whole public was interested as much as they were. They had no voice in the selection of the chauffeur, but were obliged to go with him when so directed by their superior officer. A passenger on a street car becomes so voluntarily, and there is, therefore, more reason for imputing to him the negligence of the street car company in case of his injury, than there is for making the negligence of the chauffeur the negligence also of plaintiff; and yet the rule of imputed negligence is not applied to passengers on street cars. *O'Rourke v. Lindell R. Co.*, 142 Mo. 352, 44 S. W. 254.

Clearly, the policemen were not riding in the automobile in the prosecution of a common enterprise, in the sense in which that term is used in the decisions on which counsel rely.

It has been directly held in several cases that firemen, and the driver of a hose car or a fire engine on which the firemen are riding, are not engaged in a common enterprise, and that the negligence of the driver is not to be imputed to them. *Elyton Land Co. v. Mingea*, 89 Ala. 521, 7 So. 666; *McBride v. Des Moines City R. Co.*, 134 Ia. 398, 109 N. W. 618; *McKernan v. Detroit Citizens St. R. Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347. The same principle applies in this case as in those, and the court did

not err in withdrawing from the jury the question of imputed negligence.

As the other errors argued are admitted not to be sufficient to reverse the judgment, they need not be considered.

The judgment is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 8928.

DENVER & RIO GRANDE RAILROAD COMPANY v. TEUFEL.

1. COMMON CARRIER—*Bill of Lading—Limitation of Value.* A common carrier who fails to deliver goods committed to him for carriage is responsible for no more than the value of the goods specified in the bill of lading. (Laws 1910 c. 5, sec. 8.)

   The provision of the statute reserving to the shipper "any remedy or right of action which he had under existing laws," does not impair the effect of the preceding provision limiting the carrier's liability to the value stated.

2. —— *Statement of Value by Shipper's Agent.* An agent having the authority to make shipment of goods has authority to make a statement of their value, even though he has no knowledge of the actual value.

   Like ignorance of the carrier's agent is immaterial.

Error to Delta County Court, Hon. William W. Dingman, Judge.

Mr. E. N. CLARK, Mr. G. A. LUXFORD, for plaintiff in error.

Mr. JOHN R. CHARLESWORTH, Mr. MORTIMER STONE, for defendant in error.

Mr. Justice Scott delivered the opinion of the court:

THIS action is by defendant in error to recover from plaintiff in error the sum of $203.00 for goods delivered to the carrier at Fort Collins, Colorado, for shipment to Delta, Colorado, and lost through the negligence of the carrier.

The case was tried to the court without a jury upon the following agreed statement of fact:

"1. The defendant admits that a trunk belonging to plaintiff and described in bill of lading as set forth in defendant's answer herein was delivered to defendant company to be carried to Delta, Colorado; that at the time defendant received said trunk it did not know its contents or the value thereof.

2. The defendant admits that when the said trunk arrived at Delta, Colorado, the points of its destination, the trunk was empty, and the defendant was therefore unable to deliver to the consignee certain goods, personal effects and chattels, which the plaintiff claimed to have placed in said trunk before delivering it for carriage to the defendant; the defendant admits that it has not paid anything to the plaintiff by way of settlement.

3. The defendant admits that plaintiff was and is the owner of the goods, personal effects and chattels described in plaintiff's complaint.

4. The plaintiff admits said trunk containing the goods, personal effects and chattels claimed by plaintiff was left by him, the plaintiff, in storage at Fort Collins, in the State of Colorado, and that he, the plaintiff, instructed one McMillin, proprietor of the storage house where said trunk was kept, to consign the same to the plaintiff, at Delta, Colorado, and that said trunk and contents weighed less than two hundred fifty pounds.

5. The plaintiff admits that the aforesaid McMillin did consign said trunk containing said goods to Delta, Colorado, via the Colorado & Southern Railway Company, a common carrier, and to Denver, Colorado, and thence to Delta, Colorado, via the defendant's railroad.

6. The plaintiff admits that the aforesaid McMillin did sign and execute a released valuation clause contained in the bill of lading, marked Exhibit A, and described in the further and separate answer of the defendant filed herein and accepted the same before shipment.

7. The plaintiff admits that a higher rate of transpor-

tation, as provided by the published tariff then one file, would have been required to have been paid by him for the transportation of said trunk and contents, if the defendant had, or its agents had, known the alleged value of the contents, or if the aforesaid McMillin had not signed and executed the said released valuation clause at ten dollars per hundredweight, as is alleged in the further and separate answer of defendant filed herein.

8. The defendant admits that the defendant company has made an offer to confess judgment for the sum of twenty-five dollars and costs to date.

It is further stipulated that plaintiff may introduce testimony regarding the value of said property claimed to have been lost, and to whether or not it was placed in said trunk before shipment. It is further agreed between the parties that the bill of lading filed by the defendant herein may be introduced as evidence, and it is agreed that the court may take judicial notice that the defendant has filed its tariff rates with the proper authorities, and that the same constitutes notice to all parties shipping."

The court rendered judgment against the carrier for the full amount of the claim, $203.00.

It is clear that under the common law and under the decisions of this court a contract such as the one in question was not valid either as against the negligence of the company, or the value of the shipment, and that the actual value must control, and but for the Act of 1910, section 8, chapter 5, Session Laws 1910, the judgment should be affirmed. *Union Pacific Co. v. Stupeck,* 50 Colo. 151, 114 Pac. 646.

But since that cause of action arose, the legislature enacted the statute in question, which is quite identical in substance with the Carmack Amendment to the Interstate Commerce Law upon that subject. The provision of the Colorado statute is as follows:

"Every common carrier receiving property for transportation between points within this state shall issue a receipt, or a bill of lading, therefor, and shall be liable to the lawful

holder thereof for all loss, damage or injury to such property caused by it or by any common carrier to which such property may be delivered, or over whose lines such property may pass.

No contract, receipt, rule or regulation shall exempt such common carrier from liability in this section imposed, but the carrier shall not be responsible for any greater sum than the value as fixed in the contract, receipt or bill of lading, where such valuation is stated.

But nothing in this section shall deprive any holder of such receipt, or bill of lading, of any remedy or right of action which he has under existing law.

The common carrier issuing such receipt, or bill of lading, shall be entitled to recover from the common carrier on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

The Supreme Court of the United States has uniformly held this limitation in the Federal statute to be valid and has limited the amount of recovery in such cases to the value stated in the bill of lading. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *C., B. & Q. R. R. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; *Missouri, K. & T. Ry. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Boston & Maine Ry. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450 Ann. Cas. 1915D 593; *Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576.

That a common carrier can not exempt himself from liability for its own negligence, or that of his servants, is so generally held as to become elementary. Neither does the Carmack amendment nor the Colorado statute attempt to disturb this principle. The Colorado statute, if anything, is more explicit in its terms confining recovery to the value

fixed in the bill of lading than is the Federal law, and provides:

"No contract, receipt, rule or regulation shall exempt such common carrier from liability in this section imposed, but the carrier shall not be responsible for any greater sum than the value as fixed in the contract, receipt or bill of lading, where such valuation is stated."

The language of this provision is clear and unambiguous and is plainly within the rule of the cases cited.

It is said in this case that there was no knowledge, either upon the part of the plaintiff's agent or the agent of the company, as to actual value, and therefore the agreement was arbitrary and for such reason may be avoided. But in the *Express Company case,* supra, it was held:

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of $50, unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission."

In the case of an interstate shipment, arising in this state, it was held by this court that the contract was controlled by the Act of Congress, and the construction of that act by the Federal Supreme Court was approved. *Appel Co. v. Platt,* 55 Colo. 45, 132 Pac. 71. In that case the recovery was limited to the value of the shipment as stated in the receipt, or bill of lading. We must construe a like statute of the state to be valid and binding on the parties, and hold in this case that the amount of recovery is fixed by the agreement in the bill of lading.

It is contended that the warehouseman who delivered the goods to the carrier was without authority to bind the plaintiff as to value by the acceptance of the receipt. But the authority of this agent to make the shipment is conceded. Indeed it is alleged in the complaint that the plaintiff delivered the goods to the carrier, and in the agreed state-

ment of fact, it is admitted that McMillin, the agent, delivered the goods under authority of plaintiff. If the agent had authority to make the shipment, it follows that he had authority to make the statement as to value.

The Colorado act contains the following provision:

"But nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

It is contended by counsel that this discloses that it was thus not the intention of the legislature to deprive the shipper of his then existing common law remedy against the carrier. But the provision is in the precise wording of a like provision of the Federal statute, and has been construed by the Supreme Court of the United States, contrary to the contention of defendant in error.

It was said of this clause in *Adams Express Co. v. Corninger*, supra, that:

"What this court said of the 22d section of this ACT of 1887 in the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act. Again, it was said of the same clause, in the same case, that it could not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act can not be said to destroy itself."

The judgment is reversed.

Hill, C. J., and Garrigues, J., concur.

No. 9176.

WAMSLEY v. THE PEOPLE.

1. PARENT AND CHILD—*Parent's Duty to Support.* Under chapter 179 of the Laws of 1911 the father of an illegitimate child under sixteen years of age may be prosecuted for his failure to support it, without any prior adjudication of the paternity and this whether the child were begotten before or after the enactment of the statute.

   No provision of the bastardy act (Rev. Stat. c. XII) has any bearing upon such prosecution.

2. CONSTITUTIONAL LAW—*Title of Act.* The statute requiring the father to support his illegitimate child is not invalidated by the omission to mention illegitimate children in the title.

3. —— *Ex Post Facto Legislation.* A statute punishing the failure to support an illegitimate child, held effective, where the child was begotten before the enactment of the statute.

Error to Juvenile Court, Hon. George W. Dunn, Judge.

Mr. CARL H. COCHRAN, for plaintiff in error.

Hon. Mr. LESLIE E. HUBBARD, attorney general, and Mr. CHARLES ROACH and Miss CLARA RUTH MOZZOR, assistants attorneys general, for the people.

Opinion by Mr. Justice Allen.

THE plaintiff in error was prosecuted and convicted, in the Juvenile Court of the City and County of Denver, under the non-support statute (Session Laws, 1911, p. 527; section 3450, Mills Ann. Sts. 1912).

The information was filed September 9, 1916, and alleges, in substance that the defendant, from January 1, 1916, to September 9, 1916 neglected, failed and refused to provide reasonable support and maintenance for his minor illegitimate child, of the age of four years.

The defendant filed a motion to quash the information. The motion was overruled, and error is assigned upon the court's action in that respect. The first ground of the motion is based upon section 6 of the statute of 1879, known

as the Bastardy Act, providing that "no proceedings under this act shall be instituted after the child is twelve months old." The motion for its second and remaining ground alleges, in substance, that every child is presumed to be legitimate until the contrary is shown, and that under the Act of 1879 no proof to the contrary can be made after the child is twelve months of age.

No part of the Act of 1879, relating to bastardy, has any bearing or effect upon the instant case. Under our non-support statute of 1911, an alleged father of an illegitimate child, in any case where such child is under sixteen years of age, may be prosecuted for failure to support it, without having been adjudged, in some prior proceeding, to be such father. See *People v. Stanley,* (Calif.) 166 Pac. 596. There was no error in overruling the motion to quash.

The brief of the plaintiff in error contains the following paragraph:

"Law under which plaintiff in error was prosecuted, known as non-support law, went into effect August 26, 1911 five months *after* wrongful act of begetting child was committed."

We assume that it is intended, by the statement above quoted, to show that the non-support law is unconstitutional as *ex-post facto,* when it is sought to apply the law to the offence charged in the information; in other words, that the law is *ex post facto* in so far as it punishes the failure to support illegitimate children who were begotten before the law was enacted. If such is the theory of counsel for plaintiff in error, the same is erroneous. The same point was raised in *Com. v. Callaghan,* 223 Mass. 150, 111 N. E. 773, under a statute making it a misdemeanor for the father of an illegitimate child to neglect or refuse to contribute reasonably to the support and maintenance of such child, whether such child shall have been begotten before or after the taking effect of the statute. The opinion in that case is applicable to the facts in the instant case, and to our non-support statute. The court, in the case above cited, said:

"It is the contention of the defendant that the statute is *ex post facto*. * * * The statute does not attempt to punish him for begetting or neglecting to support the child before the statute took effect. The statute, from the time it became a law, requires the defendant, as the father of the child, to contribute to its support and maintenance, thus relieving the mother or others upon whom the burden may chance to fall.

"If it is *ex post facto* legislation to compel the father to provide for the support of a child, not born in wedlock, because born before the statute was enacted, it might be argued that it is contrary to the Constitution to punish a husband under St. 1911, c. 456, for refusing to support his wife and children, because he was married and the children were born before the statute took effect. * * * We are of the opinion that St. 1913, c. 563, is not *ex post facto* legislation."

See also 7 Corpus Juris, 957, sec. 38; 12 C. J. 1098, and note 5; *Libby v. State*, 43 Okl. 603, 142 Pac. 496; *Bradfield v. State*, 5 Boyce's Delaware Rep. 263, 92 Atl. 988.

The plaintiff in error also claims that the non-support law is unconstitutional as to illegitimate children because illegitimate children are not mentioned in the title of the act. This question was recently disposed of by this court, in favor of the constitutionality of the statute, in *Pearman v. People* (No. 8940), 170 Pac. 192.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8948.

WESTERN SLOPE FRUIT GROWERS' ASSOCIATION v. DEVINE.

1. CONTRACTS—*Construed.* Defendant executed his promissory note to plaintiff, agreeing therein to ship all fruit raised by him through the Association until his indebtedness was paid, and authorizing the Association to deduct from the net returns from the fruit, an amount sufficient to pay the note. *Held* no privi-

lege reserved to defendant but a provision for the benefit of the Association, and one which the Association might waive.

2. —— *Defenses.* The note being given for stock in the Association, that the stock is not of the value anticipated by defendant is no defense to an action upon the note, no fraud being charged or proven, and no claim being made of any direct damage suffered by defendant, by reason of any act or omission of the Association.

Error to Mesa District Court, Hon. Thomas J. Black, Judge. Department.

Messrs. WHEELER & WEISER, for plaintiff in error.

Messrs. MCMULLIN & STERNBERG, for defendant in error.

Opinion by Mr. Justice Teller.

The plaintiff in error brought suit against the defendant in error on a promissory note, and the defendant had judgment.

The defense was (a) that the note was without consideration; (b) that the consideration was the right to ship all fruit grown by defendant through the plaintiff association, until the note should be paid, and that the plaintiff failed and refused so to ship defendant's fruit; (c) that the note was given solely to be used as collateral to plaintiff's note which had been paid before this suit was brought; and (d) that said association was formed for the purpose of aiding fruit growers, who were shareholders, to market their fruit profitably; that, induced by a statement of one Boals, a director, that stock in said association, subscribed by the defendant, would be paid for by the sale of his fruit, and that it was desired to have defendant's note, to the amount of his indebtedness for stock, to be used as collateral by the association, he signed said note, in the sum of $720, the amount he was to pay for the stock for which he subscribed; that the plaintiff did not have adequate facilities for handling and shipping fruit, and that defendant notified plaintiff that he would discontinue shipping through it; and that defendant shortly thereafter

discovered that plaintiff shipped fruit for persons who were not stockholders therein.

The real defense is the one last above set out, and it involves a construction of the note which reads as follows:

"$720.00. Palisade, Colorado, Feb. 9th, 1911.

On or before eight months after date, for value received I promise to pay to the order of The Western Slope Fruit Growers' Association, a corporation, Seven Hundred and Twenty and No/100 Dollars, at the office of the said The Western Slope Fruit Growers' Association, in the town of Palisade, Colorado, with interest at the rate of ten per cent. per annum until paid, interest payable annually; and having deposited with said Association, as collateral security for the payment of this debt of the undersigned to said Association, 48 shares of the capital stock of the said the Western Slope Fruit Growers' Association, owned by me, I hereby agree with said Association to ship all fruit grown by me through said Association until this indebtedness is paid, and authorize said Association out of the net returns to me for the sale of said fruit, to deduct an amount sufficient to pay this note and interest thereon; and I hereby authorize said Association, by its agents and attorneys, upon default in the payment of this note and interest thereon, to sell said collateral securities of any part thereof, at public or private sale, at the option of said Association, and without notice of intention to sell or the time or place of sale and without demand, for payment of this note; and the undersigned hereby further authorizes said Association after deducting the expense of such sale, including reasonable attorney's fees, to apply the net proceeds to this debt; and, in case of deficiency after any sale of said collateral, the undersigned agrees to pay to said Association, forthwith the amount of such deficiency, with interest at the above-mentioned rate; it is further agreed that at any sale of said collateral, said Association may become a purchaser thereof and hold the same in its own right, absolutely free and clear of any claim of the undersigned; it is further agreed that said Association shall have the right

to pledge this note with the collateral covered by the same, as security for any debt owing by said Association. This note may be paid in cash at any time.

Dr. J. H. Divine."

The defendant testified that he interlined at the end of the note the sentence: "This note may be paid in cash at any time." This he did, as said, because he expected some money soon and did not wish to pay the ten per cent interest specified in the note.

In September the defendant formally notified the Association that he would not take the stock, for the reason that the by-laws had been disregarded, and fruit shipped for non-shareholders.

The contention of defendant in error is that by the terms of the note he had an option to pay the note in cash, or by the net returns of his shipments through the association; and that when the plaintiff failed to receive his fruit for shipment,—as he says it did on three occasions—he was released from his obligation on the note.

We cannot so construe the note, and defendant's testimony shows that he did not originally so construe it. In it the defendant agrees to ship all the fruit raised by him through the association until his indebtedness was paid, by applying the net returns thereof to such payment. This is clearly for the benefit of the association, and is in no sense a privilege to ship through the association all the fruit grown by him, and *authorizes* it to apply the net returns to his debt.

It is a right granted by defendant to the association, and not one by it to him. It could waive this privilege and rely on its ability to collect the note without the security of his shipments. Whatever may have been defendant's rights as a stockholder to have his fruit handled by the association, there is no condition in the note that it will be so handled. The promise to pay is absolute, the stock is retained as collateral security, and provisions made for its sale in case the note is not paid.

The sentence interlined gave defendant no right which

he did not already have, except to pay the note before its maturity.

The evidence wholly fails to support the defense that the note was without consideration, or given as an accomodation. The defendant's own testimony proves that it was given to evidence his indebtedness for the stock for which he subscribed. That the stock, because of the matters of which the defendant complains, is not of the value to him which he expected it to be, is immaterial to this case, there being no fraud charged or proved.

It may be observed, also, that defendant makes no claim that he has been directly damaged by anything done or omitted to be done by the association.

Waiving the question of the admissibility of parol evidence concerning the giving of the note, and giving the evidence full consideration, it is evident that there was no agreement by which the terms of the note were changed. Under these circumstances the right to recover was clear, and the overruling of the plaintiff's motion for a directed verdict was error.

The judgment is therefore reversed, and the cause remanded for further proceedings in harmony with the views above expressed.

Chief Justice Hill and Mr. Justice White concur.

Decided February 4, A. D. 1918. Rehearing denied June 3, A. D. 1918.

No. 9028.

RIFLE CREEK MERCANTILE COMPANY *v.* BROWN.

APPEAL AND ERROR—Finding not manifestly against weight of evidence, will not be disturbed.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. C. W. DARROW, for plaintiff in error.

Mr. J. W. DOLLISON, for defendant in error.

Opinion by Mr. Justice Allen.

THIS is an action brought by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover the price of certain merchandise furnished by plaintiff to H. E. Warner and J. V. Eliott, who were tenants upon land leased to them by H. G. Brown, the defendant in error.

Upon a trial to the court without a jury, the issues were found in favor of the defendant Brown, and judgment was rendered accordingly.

The record shows that the plaintiff sought to hold the defendant Brown liable upon an alleged oral promise made by him that he would pay for the merchandise in case it were not paid for by Warner or Elliott. The defendant in his answer and in his testimony denied having made such promise or agreement.

Upon an examination of the record, and the reading of the briefs of counsel, we find no reversible error committed by the trial court. The main question presented by the record is the sufficiency of the evidence to support the finding and judgment. Upon a consideration of the evidence, we find the same sufficient to support the judgment. The trial court's finding was not manifestly against the weight of the evidence.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9268.

SOTO v. THE PEOPLE.

ATTORNEY GENERAL—*People's Case—Confession of Error.* Where in the opinion of the Attorney General error was committed in the trial of one accused of crime, it is his duty, in the interest of public justice, to confess it.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Mr. FRED W. STOW, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, for The People.

Mr. R. W. FLEMING, *Amicus Curiae.*

Mr. Justice Scott delivered the opinion of the court.

ON the 14th day of May, 1917, the plaintiff in error was convicted in the District Court of Larimer county of the murder of Ernesto Mondrano, and the penalty of death fixed by the jury. A motion for a new trial was heard and overruled and the defendant was sentenced in accordance with the verdict rendered.

The attorney general had presented a confession of error and asks a reversal of the judgment.

It is the uniform rule of this court in such cases to act affirmatively upon such request of the attorney general. By the Constitution and statutes of this state the Attorney General is the only person who is authorized by law to appear for the people, before the Supreme Court. The duty and responsibility of the control of such cases are his. In the interest of justice, and when his judgment so dictates, it is as much his duty to confess judicial error, as to contend against it.

The judgment is reversed.

En banc.

White, J., not participating.

No. 8850.

HORTON *v.* COLORADO SPRINGS MASONIC BUILDING SOCIETY.

1. TAXATION—*Exemption—Charitable Societies.* A building owned by a corporation organized by several Masonic Societies who own all the stock except the qualifying shares issued to its directors, and which derive all their income from annual dues, fees for initiation, and charitable donations, and devote it en-

tirely to the relief of the needy, is exempt from taxation, though a stand is maintained therein, for the sale to those privileged to be there, of cigars, tobacco, and other like wares, as well as a reading room for the use of members of the different Masonic bodies, and though dances and dinners are given in a room devoted to this purpose, where non-members are admitted, and an admission fee is charged.

2. STATUTES—*Construction.* Statutory provisions exempting from taxation properties used for charitable purposes are liberally construed.

Error to El Paso District Court, Hon. J. W. Sheafor, Judge.

Mr. WILLIS L. STRACHAN, County Attorney, Mr. FRED FARRAR, Attorney General, Mr. W. B. MORGAN, Assistant Attorney General, for plaintiff in error.

Mr. G. W. MUSSER, Mr. C. H. DUDLEY, Mr. E. P. HUFFERD, for defendant in error.

Mr. JOHN M. MAXWELL, *Amicus Curiae.*

Chief Justice Hill delivered the opinion of the court.

The defendant in eror obtained an injunction restraining the plaintiff in error, as treasurer of El Paso County, from collecting any taxes for the year 1914, levied upon a building and its grounds owned by the defendant in error, The Colorado Springs Masonic Building Society. The complaint alleges that said building and lots whereon it is situate are used exclusively for strictly charitable purposes. The answer denies this, and, in addition, alleges that said building has been rented to certain fraternal organizations, as a place for their meetings and entertainments. The replication admits that plaintiff rents the property to certain fraternal organizations, but alleges that said organizations are such as are commonly known as Masonic organizations, and that, together, the said organizations are the sole stockholders of plaintiff, save and except ten qualifying shares held by the directors thereof, and that said rental charge is made to said several organizations, solely as a method of equalizing among them the burden of the

maintenance, and operation of said property, agreed upon as fair and equitable and for no other purpose.

Trial was to the court. The findings were in favor of the plaintiff, and the property held to be exempt from taxation. According to the issues, this had to include a finding that the lots and buildings thereon were used exclusively for strictly charitable purposes. The contention is that the evidence is insufficient to sustain this finding. The testimony is uncontradicted. It shows that the defendant in error is a society organized not for profit; that the principal purpose of its organization was to construct and own a temple or lodge building to be used as a home for the several Masonic organizations of Colorado Springs, including a collateral order known as the Eastern Star; that it was organized by these several Masonic bodies who own all of its stock, with the exception of the ten shares held by its ten directors. Its by-laws provide that none of its stock shall be sold or transferred to any one, except these various Masonic bodies, etc., or their trustees, for the use of said bodies. It is also shown that no other bodies, societies, persons or corporations have used said building since it was erected. The testimony also discloses that these Masonic societies derive their income from annual dues paid by their members, fees for initiation, and donations; that out of this are paid the operating expenses of this building, and the maintenance of these several lodges, and that the balance is used in relief and charitable work; that they contribute from their fund to the relief of their members, wives, widows and orphans, and other Masons who come there for their health, and require assistance; that they are not limited in these respects to this class of persons, but frequently aid other charitable organizations, and needy persons not connected with Masonic societies; that they maintain a plot in a cemetery furnishing graves and headstones for individuals, and frequently pay the entire expense of burial; that some of them contribute to the furnishing of a room in a hospital, for the general use of the hospital; that each of said respective bodies has a re-

lief committee, and there is a general Masonic relief board, to which all contribute; that they visit the sick, and extend advice and assistance to the families of sick persons; that they inculcate and teach to their members respect and support of government and legal authority, right living, service to their fellowmen, morality, temperance and other virtues; that they not only aid in a material way, by furnishing food, clothing and other necessities, but that they aid and comfort mental distress, and alleviate pain and suffering, all of which is done without compensation, gain or profit; that no one has a right to demand or receive anything from them; that they accept and give upon the call of humanity, and minister to man, woman and child as far as their ability as societies will permit; that frequently deficiencies occur in their treasury which are made up by donations of other legitimate means. Per the great weight of authority, this testimony is sufficient to justify a conclusion that these societies are charitable institutions, and that their purposes are charitable purposes.

Burdine v. Grand Lodge, 37 Ala. 478; *Mayor, etc., of Savannah v. Solomon's Lodge,* 53 Ga. 93; *Massenburg et al. v. Grand Lodge,* 81 Ga. 212, 7 S. E. 636; *City of Indianapolis v. Grand Lodge, etc.,* 25 Ind. 518; *Morrow, Treasurer, v. Smith, Ex'r,* 145 Iowa 514, 124 N. W. 316, 26 L. R. A. (N. S.) 696, Ann. Cas. 1912A, 1183; *Mason et al. v. Zimmerman et al.,* 81 Kan. 709, 106 Pac. 1005; *Masonic Home v. Sedgwick Co.,* 81 Kan. 859, 106 Pac. 1082, 26 L. R. A. (N. S.) 702; *State v. Board of Assessors,* 34 La. Ann. 574; *Fitterer v. Crawford,* 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191; *Plattsmouth Lodge v. Cass County,* 79 Neb. 463, 113 N. W. 167; *State v. Addison,* 2 S. C. 499; *Lodge v. Nashville,* 127 Tenn. 248, 154 S. W. 1141.

Section 5 of article X of our Constitution provides that "Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or strictly charitable purposes * * * shall be exempt from taxation unless otherwise provided by general law."

The only law that we have on the subject is section 5545 Revised Statutes, 1908, it provides that

"The following classes of property shall be exempt from taxation, to-wit: * * *

Second—Buildings used exclusively for religious worship, for schools or for strictly charitable purposes, with the grounds whereon the same are situated."

The question for determination is, whether this building (Masonic Temple so-called) is used for strictly charitable purposes within the meaning of our constitution and statutes. The plaintiff in error appears to concede, were the entire building used as lodge rooms, and for lodge room purposes, there would be more reason for the contention that it would come within these provisions, but calls attention to testimony disclosing that while the second floor of the building contains three lodge rooms, with the usual smaller rooms (all of which are used for strictly lodge purposes), the first floor contains a reading room for the use of the members of these different lodges, a smoking and reception room, and another large room which is sometimes used in connection with these other rooms for dinners and dances given by members of these different bodies; that sometimes these entertainments are restricted to members, and sometimes they include non-members. He concedes that said societies use the surplus or income from all sources, after paying running expenses, for strictly charitable purposes. He also concedes that the defendant in error pays no dividends; that none of its officers receive any remuneration for their work; that the rental charge to the different lodges is made solely to cover the actual and necessary operating expenses of the building, and that it never has thus far exceeded or equaled such expenses; that while an admission fee is usually charged for dances, the receipts above actual expenses are, like other funds, devoted to the maintenance of the building. The defendant in error maintains in the building a stand for the sale of cigars, tobacco, playing cards and gum, to those privileged

to be there, but no profit is derived therefrom, and thus far it has been conducted at a loss.

In considering this question, we agree with counsel for plaintiff in error that in one sense it is immaterial what kind of an organization owns this property; that the test is the use made of the property, but in deciding this question it is proper to consider the surrounding circumstances. When thus considered, we are of opinion that for the purposes of taxation the same rule applies to it as would were it owned and directly controlled by these sundry Masonic societies.

Vol. 37 Cyc. 927; *Glengary Co. v. Boehmer,* 28 Colo. 1, 62 Pac. 839; *Kappa Kappa Gamma v. Pearcy as Treasurer, etc.,* 92 Kans. 1020, 142 Pac. 294, 52 L. R. A. (N. S.) 995.

There are two lines of authorities concerning the rule of construction applied to exemption from taxation of properties like that under consideration; one has adopted the strict rule of construction, the other, the liberal or broader rule, as it is termed. This court has heretofore adopted the liberal or broader rule.

In *Cathedral St. John v. County Treasurer,* 29 Colo. 143, at page 145, 68 Pac. 272, the court says:

"The general rule is, that exemptions from taxation are strictly construed, but this rule is not applied with full vigor to the character of exemptions under consideration. In other words, provisions exempting property used for educational purposes are less strictly construed than those exempting property used for ordinary gain or profit. * * *

The words 'solely' and 'exclusively' employed in the provisions of the law under consideration are words of limitation which in their ordinary sense strictly limit the subjects to which they refer, but their purport and meaning in this instance must be ascertained from the intent of the people and the legislature in exempting from taxation property used for educational purposes. In providing for these exemptions, the object was to foster educational institutions by relieving their property, within prescribed limits, from the burden of taxation. This being the end

to be attained, the meaning of the law must be ascertained by a construction within its spirit, purpose and policy not opposed to its letter. * * * The fundamental object of the law was to exempt property used for school purposes from taxation. To carry out this design, the uses permissible must necessarily embrace all which are proper and appropriate to effect the objects of the institution claiming the benefits of the exemption. * * *

So that a use incident to the main purpose for which the property is held is not one which falls within the prohibitions contemplated by the law."

While this case involved the exemption of property used for educational purposes, the rule pertaining to property used for charitable purposes is the same, and was thus recognized in *Bishop and Chapter v. Treasurer,* 37 Colo. 378, 86 Pac. 1021, (known as the Oakes Home case) wherein it is said that a charity as regards the character of the work to be performed, includes whatever will promote in a legitimate way the comfort, happiness and improvement of an indefinite number of persons. While the conclusion reached in this latter case has been seriously criticised, which it may be subject to upon account of the facts pertaining to the services rendered, and the amount of the charges paid therefor, as disclosed by the record, yet were its declarations applied to the facts of this case where nothing is received or expected for the charitable acts continuously performed, it would not be subject to the criticism lodged against it. This liberal rule was also followed in *Colorado Seminary v. Arapahoe County,* 30 Colo. 507, 71 Pac. 410.

In Vol. 12 Am. & Eng. Encyc. of Law (2nd Ed.) at page 306, it is said:

"There are several classes of exemptions in reference to which it has been suggested that the rule of strict construction should be relaxed.

This has been suggested in relations to exemptions of religious, charitable and educational institutions, on account of their meritorious nature and the fact that they

relieve the government of burdens which it would otherwise have to bear."

This rule, or suggestion as the author terms it, was followed in:

Elks v. Groesbeck, County Treas., 40 Utah 1, 120 Pac. 192, Ann. Cas. 1914 C, 940; *State v. Fisk University*, 87 Tenn. 233, 10 S. W. 284; *M. E. Church South v. Hinton*, 92 Tenn. 188, 21 S. W. 321; *Lodge v. Nashville*, 127 Tenn. 248, 154 S. W. 1141; *City of Indianapolis v. Grand Master, etc.*, 25 Ind. 518; *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589, 50 L. R. A. (N. S.) 1197; *Sisters of Charity, etc., v. Collector, etc.*, 52 N. J. Law, 373, 20 Atl. 292, 9 L. R. A. 198; *Association, etc., v. Mayor, etc.*, 104 N. Y. (59 Sickle) 581, 12 N. E. 279; *People, etc., v. Commissioners of Taxes*, 36 Hun (43 N. Y.) 311; *People ex rel. v. Commissioners of Taxes*, 11 Hun (18 N. Y.) 505; *Blackman v. Houston Tax Collector, et al.*, 39 La. Ann. 592, 2 South. 193.

The fact that these societies or their members sometimes give a dinner or a dance in the reception and other rooms upon the lower floor, in our opinion, does not change the nature of the use of the building. Many things depend upon who is doing them, and the purposes for which they are being done. For instance, the proprietor of a hotel serves a meal in his dining room at a certain price, for his gain and profit,—in such case no one would contend that it was being used for charitable purposes, yet when a religious organization serves a meal or lap supper in the basement of its church, and charges for it, even for the purposes of raising money to meet a deficiency in connection with its church matters, or to be used in religious work, no authority has ever held that for that reason the church building was not used solely and exclusively for religious worship. The aims and objects of these societies are charitable. The moneys received from their members and otherwise, except sufficient to perpetuate their existence, are devoted to charitable purposes; their existence requires a place like the building under consideration within which to

exist, in order that their charitable work may be continued. The reading rooms, etc., in connection with the lodge rooms, make them all the more attractive and tend to increase the membership, which in turn gives greater opportunity to enlarge the charities performed. The dances and dinners referred to are but an incident in the social life of these societies; they are not for gain or profit, although they may, in some instances, add to the revenue and in the end help to provide more funds to be used by the societies in their charity work. *Lodge v. Nashville,* 127 Tenn., 248, 154 S. W. 1141. It is conceded that the news stand affords no profit to any one, but is simply a matter of convenience. While we appreciate that there is a conflict of authority upon questions of this kind and that it is not always easy to fix the dividing line, yet when tested by what is termed the liberal or broader rule of construction given to the language of our constitution and statutes by former decisions of this court, we cannot agree that the evidence in this case, to which this opinion is limited, is insufficient to justify the findings that this building was being used solely and exclusively for charitable purposes.

Cases holding that property used principally for the benefit only of persons in some way related to the members of a society (an artificial class as it is called) are not exempt have done so generally for the reason that the constitution or statute governing the case provided that the charity shall be a purely public charity. This is true of Pennsylvania, Ohio, Minnesota, Maine and perhaps other states. These cases are not applicable to the question under consideration. Our constitution does not contain the word "public" in connection with "strictly charitable purposes." In addition to the cases heretofore cited, the following, in principle, sustain our conclusion: *St. Paul's Church v. Concord,* 75 N. H. 420, 75 Atl. 531, 27 L. R. A. (N. S.), 910, Ann. Cas. 1912A, 350; *St. Mary's Church v. Tripp, City Treas., etc.,* 14 R. I. 307; *Yale University v. New Haven,* 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490; *Emerson v. Trustees of Milton Academy,* 185 Mass. 414, 70 N. E. 442; *First*

Unitarian Society v. Hartford, 66 Conn. 368, 34 Atl. 89; *Curtis, Collector, v. Odd Fellows,* 99 Me. 356, 59 Atl. 518; *Masonic Home v. Sedgwick Co.,* 81 Kan. 859, 106 Pac. 1082, 26 L. R. A. (N. S.) 702; *Fitterer v. Crawford,* 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191.

The former opinion will be withdrawn and the judgment affirmed.

Affirmed.

Decision *en banc.*

Mr. Justice White and Mr. Justice Teller dissent.

Mr. Justice Teller dissenting:

The exemption of a single piece of property from taxation is not in itself of great moment; but the announcement of a rule under which much property becomes exempt calls for serious consideration. I cannot, therefore, permit the majority opinion to go with a simple dissent.

It assumes, on grounds which to me appear wholly insufficient, that we are bound by former decisions of this court to give to the statutory and constitutional provisions concerning exemption from taxation so liberal a construction as thereby to hold the property here involved not liable to taxation.

The assumption is wrong for two reasons. First, the decisions cited as committing us to the rule of liberal construction do not determine that such rule should be generally applied in this jurisdiction, but only that the rigor of the rule should be modified as to schools; and, second, if it be conceded that the liberal rule has been adopted here, and that it ought, under the doctrine of *stare decisis,* to be followed, it is not applicable in this case.

The majority opinion relies upon *Cathedral of St. John v. County Treasurer,* 29 Colo. 143, 68 Pac. 272, as authority for a liberal construction of the provisions under consideration. In that case the court said:

"The general rule is, that exemptions from taxation are strictly construed, but this rule is not applied with full vigor to the character of exemptions under consideration."

The case involved the question of whether or not a portion of the school property occupied by one who was an instructor in the school was exempt.

The court held that the object of the exemption of schools was "to foster educational institutions by relieving their property within prescribed limits from the burden of taxation." It held further that:

"To carry out this design, the uses permissible must necessarily embrace all which are proper and appropriate to effect the object of the institution claiming the benefits of the exemption."

It was therefore determined that the occupation of a part of the premises by the instructor of the school was a use incidental to the main purposes for which the property was held.

This affords no possible ground for holding that the first floor of the so-called Masonic Temple is exempt. The construction there applied was, as the opinion states, necessary to prevent a limitation of the exemption to the things which are absolutely indispensable to a school, and thus interfere with its work. If it be supposed that a clubhouse or social-hall is indispensable to the main purpose for which the Masonic Lodges are instituted and property acquired, it is pertinent to inquire why the great majority of lodges have not and never have had club rooms annexed to them? It is also asserted that the liberal rule was followed in *Colorado Seminary v. Arapahoe County*, 30 Colo. 507, 71 Pac. 410. This also involves a school. The liberality of the rule there followed is indicated by the language of the court concerning it, and announcing that a former decision apparently laying down the rule of strict construction in such cases was open to modification so as to determine the fair meaning of the school's charter. The court said:

"The construction should be reasonably strict, but not so strict as to defeat the obvious intention of the General Assembly."

The court was there considering the language of the

charter, and no reference was made to the constitutional and statutory provisions here involved. It held that it was proper to assume that the legislature intended to encourage the founding and maintenance of a school of higher learning, and that, therefore, it must be supposed that the exemption extended to the school's property generally. There was no occasion to consider the terms "exclusive," "solely" or "strictly."

Another case cited is *Bishop and Chapter v. Treasurer,* 37 Colo. 378. This case contains no discussion of the rule and the holding is simply that on the evidence, under the authorities, the property in question was used for charitable purposes.

If, however, it be considered that the cases cited commit us, in any degree, to a rule which is in conflict with sound legal principles, we should not be deterred from announcing the following the correct rule. In *Colo. Sem. v. Arapahoe Co., supra,* in speaking of changing the rule of construction, it is said:

"No general rule of property has been established, no private rights have been acquired by third persons upon the faith of its protection, and none will be impaired if a review of the judgment results in a change of doctrine."

To apply to enactments providing for exemptions a liberal rule of construction is unreasonable, and in conflict with the weight of authority and with established legal principles. As is pointed out in one of the foregoing quotations, taxation is the rule, exemption the exception; and he who claims the benefit of the exception must establish clearly and fully his right thereto. Exemption is in the nature of a privilege conferred by the sovereign,—the public,—and, when the right to it is questioned, it is the duty of the courts, according to the most elementary principles of construction, to resolve all doubts in favor of the state. To apply a liberal rule of construction, is to violate this principle. The rule is applied often, if not generally, to remedial laws, to advance the remedy and suppress the mischief; and in other cases to avoid the effect of out-

grown technical rules. It should never be applied to defeat the plain language of the statute or to give it effect beyond its evident purpose. We have heretofore condemned the practice of

"setting up what the court or judges may conceive to be the 'spirit of the law' against the plain letter and principles of the law." *In re Garvey*, 7 Colo. 502, 4 Pac. 758.

The rule is generally applied in determining whether or not an individual or an organization is within a favored class; but is not applied to relieve one in such class from strict compliance with a prescribed procedure.

It is only by a liberal interpretation of the word "charitable" that the lodge itself can be held to be a charitable organization.

The basis of the exemption of charitable institutions is that the State does not lose thereby, since they assume a burden which the State must otherwise bear. *Bishop and Chapter v. Treasurer, supra.*

Conceding, now, that by the weight of authority Masonic lodges are charitable institutions, and that the property used for strictly lodge purposes should be exempt from taxation, it by no means follows that all of the property here involved is entitled to such exemption. How can it be said that the use of so much of this property as is in effect a club-room for the use of lodge members—with no necessary connection with the general work of the order,—relieves the State of any burden? No construction of the law is required to determine that the use of at least one-half of the property does not meet this basic requirement of a use for charitable purposes such as justify an exemption from taxation.

The majority opinion in one place recognizes that the question turns upon the *use* of the property, though apparently not making it determinative of the case. It fails to apply the rule that in interpreting statutes and constitutional provisions every word must be given a meaning, so far as possible, in that the words "solely," "strictly," and "exclusively" are ignored. True, an attempt is made to

show that the club-house part of the property is used for charitable purposes by reference to entertainments in Churches, which, it is said, do not prevent church property being exempt. This overlooks the patent fact that entertainments in church buildings are of occasional occurrence only, and are open to everyone; while the first story of this property is devoted all the time to social purposes, for the benefit of lodge members and their friends. The one is an incident to a charitable use; the other is an independent and continuous use, with no necessary or natural connection with the use of the rest of the property.

If the court's reasoning be sound, a golf course connected with the building, the receipts of which are devoted in part to lodge purposes, should likewise be exempt. It should be noted, too, that there is nothing in the record which *assures* any receipts from the use of the first floor to charitable uses. It may be so conducted as to yield no profits, and, if there are profits, they may or may not be devoted to charity. The result of this consideration is that we have exempted a property from taxation on the mere possibility that it *may be* a source of income to an institution which has, without much reason, been termed a charitable institution.

In this connection we should consider the words "strictly," "solely" and "exclusively." What force or meaning does the majority opinion give to them, if a building used in part for purposes which are not "strictly" charitable, is held to be within the terms of the law? Clearly, the court has in practical effect stricken those words from the constitution and the statute.

The difficulty in drawing the line in applying the law of exemption if *partial* use for the specified purposes gives the right, or if the purposes are not clearly apparent, is evident; and doubtless the law-makers had that fact in mind, and *ex-industria* provided that the use should be *solely* and *exclusively* for charity, and that the purposes should be strictly charitable. The terms used prohibit the construction now given to the law.

The majority opinion states that the existence of these lodges "requires a place like the building under consideration within which to exist, in order that their charitable work may be continued."

Manifestly, this is a mistaken statement. Of the thousands of Masonic lodges throughout the country, it is safe to say that but a small proportion own buildings, and still less of them have club-rooms in addition to lodgerooms. The maintenance of the club-rooms, it is said, tends to increase the membership and so enlarge their charities. By parity of reasoning, they should be allowed to conduct, free from taxation, a picture show, or any other amusement device, which would tend to attract new members. This well illustrates the difficulties which confront us when we abandon the limitations imposed by the law, and attempt to create a "twilight zone" between the exempt and the non-exempt.

A strict construction of the statute and the constitutional provision is demanded by a consideration of the history of taxation.

Under a simple social organization, with a rapid increase of wealth and tax-paying power, the question of exemptions was not of very great importance; but, with increased complexity of social and political relations, and consequent increase of public expenditures, it becomes more and more necessary to widen the field of taxation so as to equalize the burdens of government.

The changed conditions have produced a new view of the law as to exemptions, and the tendency is to limit rather than to expand them. In *Massenburg v. Grand Lodge*, 81 Ga. 212, 7 S. E. 6361, the court said:

"The more one investigates the constitutions, statutes and reports of the several states, the more will he be impressed with the tendency to narrow the range of exemptions from taxation, and to lay stress on the open, visible and direct use of property as a test of its exemption in the interest of charity."

This tendency is shown in a number of modern cases.

In *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 100 N. W. 837, 106 Am. St. 984, it appeared that the second floor of the building in question, which was owned by the lodge, was used for lodge rooms, while the basement and first floor were used as a club-house for the entertainment and amusement of the lodge members. The court, holding that the property was not used exclusively for benevolent purposes, said:

"While some of the aims of the order are the promotion of benevolence and charity, it is the avowed and obvious purpose of the order to maintain this club-house as a suitable place for the members and their families to congregate for entertainment, amusement, and to provide refreshments. The bestowal of these privileges and benefits is not of a benevolent or charitable character."

It is true that the court there found that the use made of the property resulted in a pecuniary profit, which fact defeated the claim to exemption, but, on the point that the maintaining of a part of the building as a club-house is not an exclusive use for charity, the case is authority. The entire property was held taxable.

In *Boston Lodge Order of Elks v. Boston*, 217 Mass. 176, 104 N. E. 453, a building containing lodge-rooms, and club-rooms, kitchen, etc., was held taxable on the ground that the property was used principally for social, and not charitable purposes.

In *St. Louis Lodge No. 9, B. P. O. E. v. Koeln*, 262 Mo. 446, 171 S. W. 329, L. R. A. 1915C 694, Ann. Cas. 1916E, 784, a like ruling was made upon a similar state of facts.

In *Y. M. C. A. v. Patterson*, 61 N. J. L. 420, 39 Atl. 655, it is said:

"In all statutes exempting property from taxation words descriptive of the property must receive the narrowest interpretation of which they are reasonably capable. So interpreted charitable purposes are eleemosynary purposes, connected with the distribution of charity, i. e., of aid to the needy. It is impossible to hold that these buildings are, in this sense, used exclusively for charitable purposes. With

slight exceptions those who use them are not the recipients of charity, but such as purchase the right to use them at a price deemed adequate."

It was therefore held that since the building was not used exclusively for charitable purposes it was not exempt.

In *Fitterer v. Crawford,* 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191, it was held that none of the property was exempt unless it was all used for charitable purposes; that it was not enough that the income from a part not used by the lodge was applied to charitable use.

It is clear that the use of part of the building for non-charitable purposes puts that much of the property in competition with all persons who have property to rent for similar purposes. Were the first floor of the building not used for social purposes, the parties not thus using it must, if they would have a club-room, either buy or lease other property which pays taxes. No one would claim that property, used as is the first floor of the building in question, and separate from the building containing the lodge rooms, would be exempt. That being so, it is evident that the only ground of exemption is its physical connection with the lodge rooms. It cannot be said that the people, who frequent the rooms on the first floor and enjoy its privileges, are objects of charity. Doubtless, they would resent such an imputation. Yet, if as to them the first floor is not devoted to charitable uses, it is not so used at all.

According to the majority opinion the fact that the income from the use of the first floor, if any, is devoted to charity makes the use of that floor charitable. But that is contrary to the authorities and to the plain meaning of the law.

In *Trustees v. Bohler,* 80 Ga. 159, 7 S. E. 633, it was held that property whose rentals were applied to the construction of an alms-house was only indirectly used for charity, and hence was taxable.

In *Mason v. Zimmerman,* 81 Kans. 799, 106 Pac. 1005,

it was held that a building occupied by the Grand Lodge of Masons was not exempt because not "used directly, immediately and exclusively in dispensing charity."

Clearly, this building is not used solely and exclusively for strictly charitable purposes, and ought not, therefore, to be exempt.

Decided June 4, A. D. 1917. Rehearing granted.

Affirmed on rehearing May 6, A. D. 1918.

No. 9100.

DRACH v. LECKENBY ET AL.

1. OFFICER—*De Facto—Salary.* Payment of the salary of an office to one occupying it without right, but performing its duties, bars the action therefor of the officer *de jure* against the state.

   But one who not being entitled to an office performs its duties, under a mistaken claim of right, made in good faith, will not be allowed to recover the salary thereof after another has been judicially ascertained and declared entitled thereto.

2. —— The *de jure* officer, ready and willing to discharge the duties of his place, and prevented only by the *de facto* incumbent, may recover the salary from the *de facto* officer who has received it.

Error to Denver District Court, Hon. Chas. C. Butler, Judge.

Messrs. BARNETT & CAMPBELL, for plaintiff in error.

Messrs GOSS & KEMP, Mr. HAROLD H. HEALY, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

The action was in *mandamus* by E. E. Drach to compel the State Auditor to issue warrants for salary earned while acting as State Bank Commissioner. In response to the alternative writ the Auditor filed an interpleader which set out that one McFerson claimed to be the *de jure* Bank Commissioner for the period in question, and entitled to the salary, and prayed that he be brought in in order that

the court might determine to whom the warrants should issue, and he was accordingly made a party.

In his answer to the alternative writ McFerson set up a final judgment in *quo warranto* which declared him to be the *de jure* Bank Commissioner, and to have been such officer from May 6th, 1915, to July 5th, 1916, the time for which petitioner demanded pay, and during which period Drach was held disentitled to the office. The court entered judgment against Drach, and the auditor was directed to issue warrants for the salary during the period in question to McFerson. This decree is here for review on error. In the opinion the parties will be designated as in the trial court.

It will be necessary to consider only those assignments which relate to the right of Drach as *de facto* Bank Commissioner to recover salary. The question is whether a *de facto* officer, who performs the duties of an office to which there is a judicially ascertained *de jure* claimant after surrender of the position to such officer, recovers salary.

It is urged that there is no property right in a public office; that it is not a franchise, and that the one who performs the duties is entitled to the pay. Cases holding that the salary of an officer may be increased or reduced at the will of the legislature, or that, in the absence of constitutional inhibition, it may lawfully abolish an office, or that the salary is deemed an equivalent for the services rendered, or that a person is not entitled to the salary unless he both hold and discharge the duties of the office, are cited in support of the claim of petitioner. These principles may be conceded to be correct, but they have not the remotest application to this case.

Henderson v. Glynn, 2 Colo. App. 303, 30 Pac. 265; *El Paso County v. Rhode*, 41 Colo. 258, 95 Pac. 554, 16 L. R. A. (N. S.) 794, 124 Am. St. 134, and *Thompson v. City of Denver*, 61 Colo. 470, hold that payment to a *de facto* officer is a defense to the State in an action by the *de jure* officer to recover the salary. From this sound doctrine peti-

tioner attempts to extract the premise that because he might have compelled payment of his salary while performing the duties of the office, he may after the *de jure* officer has been disclosed by court decree, still enforce his claim against the State. It is true, as urged by petitioner, that such payment to him while he occupied the office would have barred McFerson from recovery from the State, but he, however, ignores the proposition that McFerson, after having been declared the *de jure* officer, could have maintained an action against the *de facto* officer for the emoluments of the office, even though the latter had discharged the duties attached to the place. Drach while serving might have compelled payment to him, not because the salary attaches to the person who performs the service, but because as matter of sound public policy, the business of the State must go forward in an orderly manner, and the question of the right to the office not having been determined the *de facto* officer, in the interest of the public, and because the question of title to the office cannot be determined in mandamus, is permitted to perform the service and get the salary. But when the *de jure* officer has been ascertained, the *de facto* incumbent must respond to him for such salary. That the *de jure* officer can compel such repayment is almost unanimously held. The only well considered case, which we have been able to find, holding otherwise, is *Stuhr v. Curran,* 44 N. J. L. 191, 43 Am. Rep. 353.

In *Eubank v. Montgomery County,* 127 Ky. 261, 105 S. W. 418, 128 Am. St. 340, reported in 16 A. & Eng. Ann. Cas. 483, at page 484, it is said in discussing the rights of a *de facto* officer to salary:

"* * * We are satisfied that in the case at bar Eubank was standing on his legal rights with notice that his right was disputed, and that he took the risk of his right being upheld. A man cannot be allowed to hold on to an office to which he is not entitled when he knows his right to the office is denied and then claim compensation for his services after it has been held that he had no right to the

office. By holding on to the office under such circumstances he takes the risk of his right being established. * * * We have held that he could not be punished for usurpation of office, and if we should now adjudge him entitled to the emoluments of the office, he would be in the same status as if he had been adjudged the office. It is a sound rule of public policy that those who hold public offices without right are not entitled to the emoluments of the office. Their acts are valid as to third persons for the benefit of the public, but they are invalid as to themselves. If their acts are invalid as to themselves, they cannot be adjudged compensation from the public for their acts."

In *United States v. Addison*, 6 Wall. 291, 18 L. Ed. 919, the court passed upon the refusal to give an instruction to the effect that if the jury should find that the *de facto* incumbent of an office had received the salary thereof, the *de jure* officer was entitled to recover from him that amount with interest, providing the jury also found the *de jure* officer was ready and willing to discharge the duties, and was prevented only by the interference of the *de facto* incumbent. This instruction was declared to correctly state the law, and its refusal was adjudged reversible error.

In *People v. Tieman*, 30 Barb. 193, it is said at page 195:

"The salary and fees are incident to the title and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that the acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. (2 Kent's Com. 295.) It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of title without legal authority, as if he were an officer *de jure*, when an individual claims by action the office, or the incidents

to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield of defense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and incidents of the office."

Speaking to the same question the Supreme Court of West Virginia in *Bier v. Gorrell,* 30 W. Va. 95, 3 S. E. 30, 8 Am. St. 17; at page 97, said:

"It seems to be well settled that a *de jure* officer who has been kept out of his office by the intrusion of another person, may by action recover from such person for the injury sustained by him, and that in such action the lawful perquisites which the plaintiff would have received if he had exercised the office are the proper measure of his recovery. * * * It seems to be a principle of natural justice, as well as law, that where one person has injured another, or received the compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and perquisites legally incident thereto. When such officer performs the duties of his office, he may demand and receive the compensation therefor allowed by law, and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at his request. The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the *de jure* officer may recover the profits from him by an action in *assumpsit* for money had and received to his use. * * * Where the office is one with a fixed salary attached to it, the officer will be entitled to recover the entire official salary, without any deduction for the services of the incumbent, or for what he may have earned himself while ousted."

In discussing the right of a *de facto* officer to compel payment by the State of his claim for services while wrongfully in office, the court in *Matthews v. Supervisors*, 53 Miss. 715, 24 Am. Rep. 715, said:

"The question at issue here is whether he can assert against the State, or against a county, which is the constituent part of a State, a demand for office fees, which he claims to have earned by a violation of her constitution. If he can do so, there is an end at once of all distinctions between a *de jure* and a *de facto* officer, since it is impossible to perceive how the latter, while undisturbed by *quo warranto*, occupies a position at all inferior to the former. The acts of both are alike valid, both would be protected from the assaults of private persons, and each would have an equal claim upon the State for compensation. Such a construction of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over, would be liable, indeed, to be ejected at the end of a long and costly litigation, but in the meantime he would have grown rich by the fees and salaries which he would have extorted from the State, whose laws he had violated in holding the position."

The principle that the emoluments of the office belong to the *de jure* officer is asserted and approved in *Coughlin v. McElroy*, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. 224:

"The courts of this country that have had occasion to pass upon this last question have almost unanimously answered it in the affirmative. That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the *de facto* officer though he performs the duties of the office, has no legal right to the emoluments thereof, are propositions so generally held by the courts as to make the citations of authorities in support of them almost superfluous. Nearly all, if not all, cases hereinbefore cited upon both views as to the liability of the city, hold that the *de facto* officer, for fees and emoluments of the

office received by him, is liable at common law to the officer *de jure*. So far as we are aware the only well considered case taking a contrary view of the law is that of *Stuhr v. Curran*, 44 N. J. L. 181, 186, 43 Am. Rep. 353, and that was decided by a divided court standing seven to five. We think the able dissenting opinion of Chief Justice Beasley in that case shows conclusively that at common law, in a case like the present, the *de jure* officer is entitled to recover from the *de facto* officer. Another well considered case directly in point in favor of this view is that of *Kreitz v. Behrensmeyer*, 149 Ill. 496. * * * That this law will at times operate harshly against the *de facto* officer, and that it will so operate in the case at bar, must be conceded; and the seeming injustice of it is forcibly stated in the majority opinion of the New Jersey court before cited; but the courts must enforce the law as it is and not the law as they think it ought to be. If the law requires to be changed that must be left to the legislature."

Speaking to the same question, Throop on Public Officers, as section 659, says:

"It is recognized in several of the cases hereinbefore cited, and directly in those contained in the note, which hold, that where an officer claims any right, by virtue of his office, he must show that he is an officer *de jure* as well as officer *de facto*. * * * Thus, as was said by a learned judge of the Court of Appeals of New York: 'Where a person sets up a title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right, that it is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act."

And at section 661:

"A person, who sues to recover from a municipality or other public body, the salary or other emoluments attached to an office which he claims to hold; or who sues a private person, to recover fees allowed by law for official services; must, if his right to the salary, fees or other emoluments, is put in issue, show, not only that he has

acted as such officer, but also that he did so as an officer *de jure.*"

And Mechem on Public Officers, section 331, states this:

"But while the acts of the *de facto* officer are thus valid as to third persons, he cannot himself acquire rights based upon his defective title. It is well settled, therefore that he cannot maintain an action to recover the salary, fees or other emoluments attached to the office."

The rights and duties of *de facto* officers are discussed in 29 Cyc. 1393, as follows:

"As the rule regarding *de facto* officers has been adopted merely with the idea of protecting the public, the *de facto* officer is not permitted to benefit personally from what is technically a usurpation of the office. He thus has no claim to the emoluments of the office. As a necessary consequence the *de facto* officer is liable to the *de jure* officer for the emoluments of the office obtained during the time he has wrongfully occupied the office."

Henderson v. Glynn, supra, El Paso County v. Rhode, supra, and *Thompson v. City of Denver, supra,* are cited by petitioner in support of his claim. These cases are not in point. They hold only that payment by the State of the salary to a *de facto* officer is a defense in a suit by the *de jure* officer to recover the same salary from the State. Such payment by the State, and such defense, is permitted upon the principle of public emergency and necessity as already pointed out in this opinion.

There are Colorado cases, however, directly supporting the doctrine that the emoluments of the office may be recovered from a *de facto* officer by the *de jure* claimant. *Morris v. People,* 8 Colo. App. 375; *Church v. Mullins,* 10 Colo. App. 318. This principle is also affirmed in *Arnold v. Hiltz,* 61 Colo. 8, which, although upon an entirely different state of facts from those here involved, is in principle authority for the views herein expressed.

That the salary is attached to the office, and is not the property of one who unlawfully holds the office and per-

forms the duties thereof, is announced and approved in following additional cases:

Cobb v. Hammock, 52 Ark. 584, 102 S. W. 382; *McCue v. Wapello County,* 56 Iowa 698, 10 N. W. 248, 41 Am. Rep. 134; *Stott v. Chicago,* 205 Ill. 281, 68 N. E. 736; *Phelon v. Granville,* 140 Mass. 386, 5 N. E. 269; *Fylpaa v. Brown County,* 6 S. D. 634, 62 N. W. 962; *Dolliver v. Parks,* 136 Mass. 499; *State v. Schram,* 82 Minn. 520, 85 N. W. 155; *Luzerne County v. Trimmer,* 95 Pa. 97; *Com. v. Slifer,* 25 Pa. 23, 64 Am. Dec. 680; *Riddle v. Bedford County,* 7 Serg. & R. 386; *Vicksburg v. Gromme* (Miss.) 24 South. 306; *Christian v. Gibbs,* 53 Miss. 314; *Ermston v. Cincinnati,* 9 Ohio Sup. & C. P. Dec. 657; *State v. Newark,* 8 Ohio Sup. & C. P. Dec. 344; *Dolan v. New York,* 68 N. Y. 274, 23 Am. Rep. 168; *In re Berger,* 152 Mo. App. 663, 133 S. W. 96; *Russell v. Lyon,* 90 S. C. 5, 72 S. E. 496; *Lawrence v. Wheeler,* 90 Kan. 669, 136 Pac. 315; *Mayfield v. Moore,* 53 Ill. 428, 5 Am. Rep. 52; *Kreitz v. Behrensmeyer,* 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Douglas v. State,* 31 Ind. 429; *Sigur v. Crenshaw,* 10 La. Ann. 297; *Nichols v. McLean,* 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; *Wenner v. Smith,* 4 Utah 238, 9 Pac. 293; *Fulgham v. Lightfoot,* 1 Call (Va.) 250; *Booker v. Donohoe,* 95 Va. 359, 28 S. E. 584; *Rule v. Tait,* 38 Kan. 765, 18 Pac. 160; *Hogan v. County,* 132 Tenn, 554, 179 S. W. 128; *Sandoval v. Albright,* 14 N. M. 345, 93 Pac. 717; *State ex rel. Evans v. Gordon,* 245 Mo. 12, 149 S. W. 638; *Jones v. Dunsman,* 246 Pa. 513, 92 Atl. 707, Ann. Cas. 1916D, 472; *Comstock v. Grand Rapids,* 40 Mich. 397; *Whitaker v. Topeka,* 9 Kan. App. 213, 59 Pac. 668; *Scott v. Crump,* 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; *Andrews v. Portland,* 79 Me. 490, 10 Atl. 458, 10 Am. St. Rep. 280; *Tanner v. Edwards,* 31 Utah, 80, 86 Pac. 765, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091; *Kendall v. Rayboud,* 13 Utah, 226, 44 Pac. 1034; *State v. Carr,* 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; *Meagher v. Storey County,* 5 Nev. 244; *O'Brien v. St. Paul,* 72 Minn. 256, 75 N. W. 375; Stephens v. Campbell, 67 Ark. 484, 55 S. W. 856.

The leading case upon which petitioner relies is *Stuhr v. Curran, supra,* in which it was held that one who had received a certificate of election to a public office, and was subject to a statutory penalty, which distinguishes it from the present and other similar cases, if he failed to qualify and perform the duties thereof, might retain the salary of the office when he had performed the duties as against one who later was declared to be legally elected. This opinion, as pointed out in *Coughlan v. McElroy, supra,* was by a divided court, seven to five, with a strong and persuasive dissenting opinion by Chief Justice Beasley, in which four other Justices concurred. And it is to be further noted that in a recent case, *Gaskill v. Atlantic City,* 89 N. J. L. 269, 98 Atl. 385, upon facts quite like those here involved, it was held by the same court that a *de facto* officer could not recover the emoluments of the office from the State.

It is conceded that petitioner occupied the office under a mistaken claim of right. But such mistake, even coupled with actual performance of the duties of the place, gives no right to the salary as against the *de jure* officer. The emoluments follow, and are inseparable from, the legal title. No motive, however worthy, can protect the *de facto* incumbent from the consequences of his intrusion, so far as payment for services be concerned. The fact that he labored under a mistake of law, and was free from bad intent, does not detract from the damage done to the rightful claimant. Drach took the risk of the validity of his title, and the loss should fall upon him rather than upon the one who holds the true title.

Upon practically unanimous authority it is settled that a *de facto* officer cannot recover compensation for services rendered, after the *de jure* claimant, as here, has been judicially ascertained and declared, and a plea by the Auditor in his return to the alternative writ that McFerson had been finally declared to be the *de jure* officer would have been a complete bar to recovery of salary by Drach from the State.

The question of the right to the office having been de-

termined against Drach, the matter of awarding the salary to McFerson by decree in mandamus becomes immaterial and will not be disturbed. Under a different state of facts this question might present legal difficulties of a serious nature.

The judgment of the trial court should be affirmed and it is so ordered.

Judgment affirmed.

Decision *en banc.*

Mr. Chief Justice Hill, Mr. Justice Teller and Mr. Justice Scott dissent.

Mr. Justice Teller dissenting:

I cannot agree with the majority opinion that the question presented on this record has, in principle, been determined in this state. It is, in my judgment, a case of first impression, and should be decided on sound principle; by which statement I eliminate all precedents which are not founded on established legal principles, or which do not follow cases so founded.

A considerable part of the majority opinion is devoted to cases which hold that a *de jure* officer may recover from a *de facto* officer fees or salary which he has received, though that is not the question here presented.

This cause involves only the right to the salary of an office by one who has, *in good faith,* and under the color of right, discharged for a time the duties of such office. It may be said, of course, that, if a *de facto* officer cannot retain the salary paid him, it results that he had no right to it in the first instance. The cases on that point may, then, fairly be open for consideration in this case.

It is not to be questioned that the great majority of cases, in which the right of a *de jure* officer to the salary was in issue, support the majority opinion. My objection to following them is that they are based, either directly or indirectly, on English cases which do not apply in this country; or on an erroneous view of the ground on which the right is claimed.

In England public offices are incorporeal hereditaments, the subject of grant, and the holder has an estate in them to him and his heirs, for life, for a term of years, or at pleasure. 2 B. Com. 36. In other words, an office is property.

From that fact it follows that one entitled to an office is entitled to the emoluments thereof, even though he does not have possession of it, as fully as the owner of land of which he has been wrongfully dispossessed is entitled to the rents and profits of it. Many American cases announce this doctrine, regardless of the facts which make it inapplicable here.

In this country a public office is an agency for public purposes, and can not be sold or transmitted to heirs.

It is not a matter of grant or of contract, and is in no sense property. The majority opinion concedes this, and then proceeds to cite and approve a line of cases based wholly on the English doctrine to the contrary. Take away the common law ground of the rule which is announced in the majority opinion, that "the emoluments follow, and are inseparable from the legal title," and there is nothing to support it.

The salary is no part of the office, as has been many times held, and the very word contradicts the assertion that it belongs to the holder of the title to an office, regardless of services. Salary is compensation for services rendered, and has no similarity to income and rents from property. It does not grow out of the office, but is attached to it upon a condition implied that the officer will perform the duties of his office. Under the constitution of this state (Art. 12, Sec. 2), no person can hold a public office "without devoting his personal attention to the duties of the same."

If an office can not be held without a discharge of its duties, how can any right to the salary of it accrue to any one who has not discharged those duties?

Before one entitled to an office has qualified and entered upon its duties, he has only the right to obtain possession of it and *earn the salary*.

The rights of a *de jure* officer are thus defined in *Nichols v. McLean,* 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730, and that is the only reasonable definition that can be given. If one has no property in an office, he can derive pecuniary benefit therefrom only by doing something to earn it. This, however, is not to say that a *de jure* officer may not have a right to damages because excluded from the office, and the opportunity to earn the salary. That rests upon other grounds.

The opinion rightly limits the decisions in this state to the rule that a *de facto* officer, while still in office, may recover his salary from the state, but fails to note that such rule is in conflict with many of the cases cited, which hold that to recover from the state the officer must establish his title as a basis of his right. So far as our cases throw any light upon this question, it would seem that they are against the conclusion of the majority opinion, since they recognize a right to compensation as resulting from possession and services in the office.

Expressions not called for by the facts in those cases can not be regarded as controlling.

This case well illustrates the danger of following precedents without considering the grounds upon which they are based. The majority opinion quotes at length from *People v. Tieman,* 30 Barb. 193, a case determined by a single judge, at *nisi prius,* on an application for a mandamus. The matter quoted is pure *dictum,* since the office which the relator claimed to have exercised was found by the court to have been abolished by statute prior to the time of the alleged incumbency. It may be said in passing that this also was the ground for the decision by this court in the case of *Arnold v. Hilts,* cited in the majority opinion; that is, that the office had been abolished. This New York case is also the basis of the decision in *Dorsey v. Smith,* 28 Cal. 21, which is itself the foundation of a line of decisions in that state and of other states. On such worthless foundation does the rule rest.

The next case from which quotation is made is *Bier v.*

Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. 17, an action for damages against a *de facto* officer. This case cites as authority *Boyter v. Dodsworth,* 6 Term R. 681; *Auditor v. Benoit,* 20 Mich. 176, 4 Am. Rep. 382, and *Mayfield v. Moore,* 53 Ill. 428, 5 Am. Rep. 52. The English case involved an office held by patent, to which no fees were attached, and the right of recovery by the patentee was denied. Lord Kenyon there said:

"With regard to natural justice, the person who performs the duty is entitled to the money given for such duty. Here the defendant in fact performed the services and on principles of natural justice he is entitled to the reward."

In the Michigan case the court, after citing with approval *Smith v. Mayor,* 37 N. Y. 518, and pointing out that an office is not one of contract relation, said:

"There can be no consistent theory except that which regards official rewards as the recompense for actual or implied official work. Nor would it be possible in most cases to have the work done without some certainty of pay for it. An officer is not to be expected to work for nothing so long as it may please his enemies to assume to doubt his title. * * * The laws assume that the laborer is worthy of his hire, and the person who is required to be recognized for the time being as the legal incumbent for the purpose of doing the work should be recognized for remuneration also, so far as those are concerned with whom he deals officially, and who have no personal interest in the contest for the office."

In the New York case above mentioned it is said:

"An office in this country is not property, nor are the prospective fees of an office the property of the incumbent (*Conner v. Mayor,* 1 Seld. 285). The incumbent can not sell his office or purchase it or incumber it. It will not pass by an assignment of all his property, nor will such an assignment affect his right to prospective fees. (*Id.* and cases cited.) * * * The same authority holds, and it is conceded by the appellants here, that the right to fees

or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services (citing cases). An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. * * * There can be neither property nor contract in such a subject. It is but a deputation for the benefit and advantage of the government."

It was accordingly held that, since the plaintiff had no contract with the city, he had no right of recovery.

The Illinois decision is founded upon the English doctrine above discussed, quotes from Blackstone the definition of an office above given, and says:

"The fees of an office are incident to it as fully as are the rents and profits of land or the increase of cattle"—a statement impossible of acceptance without holding that an office is property.

An examination of the large number of cases cited in support of the majority opinion discloses the fact that a great majority of them follow the English precedents, regardless of their inapplicability under the conditions in this country. The rest of the cases are based upon the proposition that the principle which renders the acts of a *de facto* officer valid, as concerning the public and third parties, does not apply when he is claiming something for himself. If by this is meant that he can not rely upon the principle when, for his own benefit, he asserts that some particular official act performed by him is valid because done while he was a *de facto* officer, there is no reason to question it. The right of a *de facto* officer to recover for his services does not, however, depend in the least degree upon the validity of his acts. The claim is for compensation for public services which are valid on grounds of public policy. He is making no claim upon any specific act whose validity is open to question. The right of a *de facto* officer to such compensation has been recognized many times, as is shown by quotations heretofore made, and it has often been judicially recognized that until one has performed

the duties of an office he can not recovery the salary thereof.

In *Steubenville v. Culp,* 38 Ohio St. 18, 43 Am. Rep. 417, the court held that an officer while wrongfully suspended can not recover salary, "for the reason that salary and perquisites are the reward of express or implied services, and therefore can not belong to one who could not lawfully perform the services (citing *Smith v. Mayor,* supra)."

The court adds:

"Offices are held in this country neither by grant nor contract, nor has any person a vested interest or private right or property in them."

This case repudiates the English rule, because it recognizes that it does not apply here, and it also recognizes that salary results only from services, and not from title.

In *Jayne v. Drorbaugh,* 63 Ia. 711, 17 N. W. 433, a state in which the English rule is adopted, and based upon English cases, it is recognized that a salary does not necessarily go with the title. The court said:

"The right to compensation depends upon the performance of the duties, or at least there must be possession of the office in fact as distinguished from the mere right of possession."

In *Farell v. Bridgeport,* 45 Conn. 191, the court said that, as a rule, those only are entitled to salary who both obtain and exercise their offices, and that payment follows the actual discharge of the duties.

In *McAffee v. Russell,* 29 Miss. 84, it is said that a claimant having rendered no services has no right to compensation.

The majority opinion finds the dissenting opinion of the Chief Justice in the New Jersey case (*Stuhr v. Curran*) very persuasive, regardless of the fact that it is avowedly based on English cases, which, as has been pointed out, can not be authority on the question in this country. The Chief Justice says:

"These English adjudications are entirely uniform, and run through three or four centuries."

In many of the cases which form the basis of the rule

adopted in the majority opinion it is held that no one holds an office *to which he knows he has no title* has no right to compensation; which must be conceded; but these cases are used as authority in cases in which it can not be said that there is such knowledge, either actual or presumed.

The holder of an election certificate is not presumed to know the facts upon which his right to it rests, yet the rule is applied to such cases, as if he were wilfully usurping the office. The injustice of so doing is recognized in Michigan, though the English rule has been adopted there (*State v. Miller*, 24 Mich. 459, 9 Am. Rep. 131), in *Scott v. Crump*, 106 Mich. 288, 64 N. W. 1, 58 Am. St. 478, where it is held that an officer with a certificate of election is not an intruder or usurper, so that his salary could be denied him.

My objection is that a correct rule for some cases is made general and applied to other cases when there is no reason for its application.

Neither is it just to assume that an officer holding over, or claiming to have been appointed, under circumstances in which there is fair ground for his action, knows or should be presumed to know that he has no title.

This is illustrated in the instant case. The bank commissioner is a bonded officer, whose duties include the winding up of insolvent banks, and the performance of other important duties, and the public interest requires him to withhold the office from any demandant of whose right there is any doubt. A legal presumption is not indulged in to the injury of any one, unless it be necessary to the advancing of justice, and there is here no ground for presuming that plaintiff in error knew that he had no title to the office.

The hypothesis in this case is that the claim to the office is made in good faith; and that eliminates many of the cases whose basis is the bad faith of claimant.

In *Stuhr v. Curran, supra,* the New Jersey court recognized that the common law cases were not authority, and made clear the propriety of Stuhr's action, the injustice of denying him compensation, and the evil results of a rule

which denies to an incumbent, in good faith, all right to compensation, if another subsequently establishes title to the office. It shows that the evils suggested, in some cases, growing out of an allowance of fees to a *de facto* officer, are fairly offset by the dangers resulting from the contrary rule.

One of the grounds which has been given for holding a *de facto* officer entitled to recover for his services is that the public interest requires that the duties of an office be discharged; but, if an incumbent is subjected to the risk that, after having held the office in good faith, the compensation is going to another who has done nothing whatever, there would be little encouragement for a man to perform official duties in case of a dispute as to the right to the office.

If the right to compensation grows out of the title, regardless of everything else, it results that an officer *de jure* might with profit permit an officer *de facto* to perform the duties of the office. The former might engage in profitable business during the entire term, and be entitled to the salary in addition, while the other in good faith will have been acting in his official place.

This majority opinion calls attention to *Gaskill v. Atlantic City*, 89 N. J. L. 269, 98 Atl. 385, the facts in which it says "are quite like those here involved," holding that a *de facto* officer could not recover from the state. That case is not in conflict with *Stuhr v. Curran*, nor does it support the majority opinion in this case. The facts are radically different. The ground of the decision, as stated by the court, was that "an unauthorized person, who gains possession of an office by force, with full knowledge that his title thereto is disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such usurpation."

If it is true, as the opinion states, that "emoluments follow and are inseparable from the legal title," how can the state refuse salary to the *de jure* officer on the ground that it has paid a *de facto* officer?

If the right to salary is vested in the holder of the title, it can not be divested by payment to any one else. It follows that our decisions repudiate the doctrine stated in this opinion and just quoted.

A public officer is an agent of the state, and his acts, within the sphere of his official duties, are valid upon the same basic principle as that upon which the acts of agents within the apparent scope of their authority are held binding upon their principals. The reasons which relieve the public from inquiry as to the title of *de facto* officers do not apply in the case of a demand of the state for salary. The principal must be resumed to know whether or not one acting as his agent has right to do so, if that question is in issue. Moreover, the state has the means, and may take the time, to determine the question, the absence of which circumstances on the part of individuals is the principal ground of holding acts valid as to them.

It has been said that:

"The *de facto* doctrine is one of those legal makeshifts by which unlawful or irregular corporate or public acts are legalized for certain purposes on the score of necessity." *In the Matter of Ringier & Co.*, 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C 1036.

Obviously, there is no necessity for applying it in an action against the state for salary or fees.

Therefore, the only logical basis for paying salary to one in office, without determining his title, is that he has discharged the duties of the office. This is recognized in *El Paso County v. Rhode*, 41 Colo. 258, where the court gives as the reason for holding that the *de jure* officer could not recover from the county the fees allowed to the *de facto* officer that "the people can not be compelled to pay twice for the same services." Certainly there is here no recognition of any right to compensation without services, and merely because of title to office.

Hence, our cases sustain the principle for which I am now contending, and which many courts have recognized, as above shown.

I can conceive of no ground of public policy upon which, of two claimants for an office, the one who has, in good faith, and with reasonable basis for his claim, discharged the duties of the office, should be denied compensation, and it be given to the other, who has done nothing.

In every case the question of good faith may be determined in an action by the *de jure* officer against the *de facto* officer for damages.

A rule of law which punishes the innocent as well as the guilty, when the cases are easily distinguishable, ought not to be adopted, and this is especially true when the rule has no real foundation in either reason or authority.

The judgment should be reversed.

CHIEF JUSTICE HILL, *Dissenting*:

Regardless of the conclusion of the majority, which the opinion states is supported by the weight of authority, I am not convinced of its justness or that all the declarations therein contained will stand the test of time as the law of this state. As I view it, Mr. McFerson has no place as a party in this action of mandamus. *McAffee v. Russell*, 29 Miss. 84. It is conceded that Mr. Drach, plaintiff in error, had possession of the office and performed the services during the period for which he sought the salary. It is also conceded that he was acting in good faith, and that, had this suit been instituted and tried during the period he was holding the office, the writ would have issued in his favor as a matter of course. Per former decisions of this court, as well as our Court of Appeals, the auditor has no right to question the *de facto* officer's right to the salary. *Thompson v. Denver*, 61 Colo. 470, 158 Pac. 309; *El Paso County v. Rhode*, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. 134; *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265. I do not think that the *de jure* officer, after having been so declared by this court, has the right to do so by intervening in a mandamus action between the *de facto* officer and the auditor. In making this declaration, I am not claiming that Mr. McFerson has no cause of action against Mr. Drach for damages upon account of

having been kept out of the office, or, that he might not, in a proper proceeding, by showing that Mr. Drach was insolvent, or attempting to place his property beyond the jurisdiction of the court, or something that way, have the warrants withheld until the question of his damage was determined, but no such conditions are even hinted at here. However, as I view it, these questions of procedure are of but minor importance.

That portion of the opinion which I think is fundamentally wrong is the declaration, in substance, that under all such conditions the *de jure* officer is entitled to all of the emoluments of the office, even though its duties have been discharged by the *de facto* officer during the time the office was unlawfully held by him. This, as I take it, means all fees or salary, as the case may be. When I say "unlawful," I mean to distinguish it from wrongful, so far as the moral viewpoint is concerned. There certainly have been many cases, and as certain will be many more, where an office is retained by the holder of a certificate of election pending the result of a contest, and thereafter a review by this court, thus held in the utmost good faith, yet where the ultimate outcome was against him, and in some cases where even then it was the incumbent's duty to thus continue. Take a case where the result hinges upon the right of certain electors to vote at that election in certain precints, or counties, depending solely upon questions of fact, is it right to hold that the party holding the certificate must determine in advance of a judgment whether he was elected, or, at his peril, as a penalty for holding on, to lose all compensation for the services rendered, pending its determination, even though it can be shown that the contestor during said period earned a larger amount than the fees or salary of the office? To put it another way, suppose he holds onto the certificate of election, yet arranges with the contestor to take possession pending the decision, with the understanding that the contest suit continue, and it is ultimately adjudged that the contestee was entitled to the office, should the contestor be thus penalized? If this illustration is not

practical, suppose the contestor for a county office wins, and the contestee brings it to this court, but surrenders the office, and does not ask for a supersedeas, yet wins in the long run, is it just and right that the contestor be subject to this penalty for taking what is given to him by a judgment of a court of competent jurisdiction, although thereafter reversed? Likewise, as here, where able counsel and even members of this court disagree over the effect of an appointment by the governor. If this rule announced by the majority is to remain as the law of this state, it means that where any person runs, say, for a county office, receives the certificate of election, and thereafter a contest is filed against him, and determined in his favor by the trial court, is brought to this court by writ of error and reversed, say two years thereafter, and he is held not entitled to the office, that, although acting in the best of faith, he performs the duties during this entire period on the strength of the certificate of election, and judgment of the trial court that, nevertheless, he is liable to the *de jure* officer for the entire amount of the salary or fees earned, and this regardless of the damage to the other person, and even though the *de jure* officer, during the entire time, was getting a salary elsewhere, greater than he would have received had he held the office. To bring the facts within this case, the record discloses that Mr. Drach was regularly appointed on January 6, 1914, to fill a vacancy in the office of state bank commissioner, which appointment was approved by the Senate; that he qualified and continuously performed the duties until July 5th, 1916. It is not claimed that he was not acting in the best of faith in assuming that the civil service law entitled him to the office, or that in any event he was entitled to hold under his appointment until the first Wednesday of April, 1916, as set forth in the *quo warranto* action. It is also conceded that he was acting under the advice of able counsel. In addition, this court, or at least some of its members, expressed a question concerning the correctness of this judgment, which is evidenced by granting him a supersedeas, yet regardless of

all this, the ruling is to the effect that the warrants are not to be issued to him, although he performed the services, but are to be issued to Mr. McFerson, whom it is conceded did not perform the services, without any credit being given to Dr. Drach for their performance, and in a mandamus action between Mr. Drach and the auditor, wherein Mr. Drach was given no opportunity to show anything in mitigation of Mr. McFerson's damages. Is it not proper to assume that one possessed of the ability of either of these gentlemen along banking lines has more than an average earning capacity? Our statute requires a bank examiner to give his time to the performance of the duties of the office, and who can say, when the question was not allowed to be litigated, what Mr. McFerson earned during this period, or that he may not have been earning a salary greater than what he would have received from the state had he devoted this time to the office? If such is the case, or in case he received any compensation for any part of his time during said period, in equity and good conscience ought not such fact to be taken into consideration in an adjustment of the matter between them?

Under my assumption that Mr. McFerson had an earning capacity during this period, and that he used it for at least a part of this time, or if he did not, he ought to, is it fair, just, right or equitable to allow Mr. Drach nothing for the services rendered, and thereby place Mr. McFerson in a better position financially than he would have been had he held the office? I do not think so, and can not agree that this arbitrary declaration is supported by all the well reasoned authorities. In *Mayfield v. Moore,* 53 Ill. 428, 5 Am. Rep. 52, the court followed the English rule in holding that the person entitled to the office has a property right in it, in the nature of a franchise, but when it came to a question of fees during the period it was held by the *de facto* officer, in good faith, it declined to follow the English doctrine by recognizing that the equity of the parties were entitled to be taken into consideration. In passing upon this phase of the case, at page 433, the court said:

"Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and, so far as this record discloses, he resorted to no fraudulent or improper means to produce that result, he does not occupy the position he would had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses in earning them. This being an equitable action, it should be governed, in this respect, by the same rules that would obtain had this been a bill for an account, instead of an action for money had and received. He should have only a reasonable allowance for the necessary expense."

This principle is recognized in *The Auditors v. Benoit,* 20 Mich. 176, 4 Am. Rep. 382. The same rule is laid down in *Havird v. County Commissioners of Boise County,* 2 Idaho 687, 24 Pac. 542; *Sandoval v. Albright,* 14 N. M. 345, 93 Pac. 717, and *Bier v. Gorrell,* 30 W. Va. 95, 3 S. E. 30, 8 Am. St. 17. While these cases involved fees, and not salaries, in my opinion there is no difference in principle between the two. In this respect, I agree with the Supreme Court of Washington in *Samuels v. Harrington,* 43 Wash. 603, wherein, at page 605, 86 Pac. 1071, 1072, 117 Am. St. 1075, in passing upon this question, the court says:

"On principle there can be no difference between the fees of an office and the salary of an office with respect to the property rights of the officer *de jure* therein. If the right to an office carries with it a property right in the salary of the office, so does the right to the office carry with it a property right in the fees of the office, and the payment of the one to an officer *de facto* is no more a wrongful payment than is the payment of the other."

Inasmuch as my views are in the minority, I have not felt justified in giving to the damage phase of this question the time I otherwise would. As at present advised, I am of the opinion that an office in Colorado is not a franchise or property right, but that the person duly elected or regularly appointed has a legal right to possession of such

office, which includes the opportunity of earning and receiving its fees or salary, and that he has a cause of action against any one who prevents him from so doing, and that the measure of the damages, when applied to a case of this kind, should be the amount actually sustained, not exceeding the maximum amount of the salary, and that the proof should be the same as in any other case where a person has a contract of employment for a certain term, and is ready and willing to perform, yet is unlawfully kept from doing so. This to include, as in other cases, the showing of seeking other employment, the success, if any, in so doing, the result and the deduction in damages, if any, as the result of such other employment. This would be fair and equitable, and would not tend to prohibit a timid person, or one who lacks finances, from honestly and in good faith asserting his right to an office given him by a certificate of election, or by the judgment of a trial court, for fear of the heavy penalty to follow, per the rule announced by the majority, should the contest against him be ultimately sustained.

I appreciate that my views on this phase of the case are not in apparent harmony with *The People v. Miller,* 24 Mich. 458, 9 Am. Rep. 131, and *Comstock v. Grand Rapids,* 40 Mich 397; however, I can not agree with the reasoning in the first of these cases, upon which both are based. Of course, if this reasoning, announced in 1872, which is to the effect that a public office is intended as a sinecure, that there are very few duties which can not be performed by deputies to be paid by the county outside of the incumbent's salary, and that the salary is not dependent upon the work, and that the office does not require the personal services of the incumbent, and that he would not forfeit it or the salary by having the bulk or all of his duties performed by deputies, and paid therefor by the county, are sound, and that an office is to be likened unto a pedestal upon which a person is to be elevated, with the salary as a gift or donation by the people for the privilege of being allowed to elevate the incumbent to the office, then I might be com-

pelled to concede that one would be entitled to all the salary, although earned by another; but such is not the case here. Per our statute, this office calls for the time and individual attention of the appointee; besides, according to former rulings of this court, there is nothing specially sacred about an office of this kind. It can be abolished and the salary discontinued. In such case, as I view it, there is no reason for a rule which fixes the measure of damages any different concerning compensation for the performance of its duties than applies to any other case where one is unlawfully prevented from performing certain services which he has the right to perform and to receive the compensation therefor.

Decided April 1, A. D. 1918. Rehearing denied May 6, A. D. 1918.

No. 9001.

SCOTT *v.* BUCHANAN ET AL.

1. PUBLIC LANDS—*Right of Entryman.* One who has made an entry of public lands has a possessory right, good against every one but the United States, extending to all improvements which are in law a parcel of the land, e. g., a building resting upon a foundation of stone embedded in the soil.

2. LAND PATENT—*Relation of.* A patent for lands relates to the date of the entry whereon it is founded. The patentee has an action for an injury to the property committed between the date of the entry, and the issue of the patent.

3. EVIDENCE—*Presumptions.* One who destroys the improvements upon land in the possession of another must, if he would justify his action, set forth his right by answer. No presumption will be indulged in his favor.

Error to Logan District Court, Hon. H. P. Burke, Judge. Department.

Mr. HENRY A. LINDSLEY, Mr. WALTER E. SCHWED, for plaintiffs in error.

Mr. S. E. NAUGLE, for defendants in error.

Opinion by Mr. Justice Teller:

THIS cause is here for the review of an order sustaining a demurrer to the complaint. Plaintiffs in error were plaintiffs below in an action for damages. The complaint alleged the facts necessary to show a valid homestead entry, by a son of plaintiffs, of government lands upon which there were valuable improvements built into said land; that said son having died, plaintiffs, as his sole heirs, took possession of said premises, placed further improvements thereon, and made a contract with two persons to work said land and improve it, said persons taking possession under said contract; that the day following such contract, the defendants entered upon said premises, and wantonly and maliciously tore down, wrecked and destroyed all of the said buildings, and other improvements, and carried away and converted to their own use the material thereof, to the damage of the plaintiffs in the sum of $3,500, etc. It was also alleged that the government, prior to said suit, issued to the plaintiffs a patent for said land.

The demurrer was general, it being urged that the complaint did not allege ownership of the improvements; and the sole question before us is as to the sufficiency of the complaint in that respect.

Plaintiffs in error contend that improvements on public land, at the time of its entry, become the property of the entryman, at least as against a stranger making no claim to such improvements; and, further, that the allegations showing plaintiffs' possession were sufficient to support the action.

We are of the opinion that the complaint stated a cause of action, both on the ground of ownership and on the fact of possession.

The entryman has from the first a possessory right good against every one except the United States. *Shiver v. United States*, 159 U. S. 491, 40 L. Ed. 231, 16 Sup. Ct. 54, 32 Cyc. 818. This, of course, includes everything which is classed as a part of the realty. The allegations of the complaint are that the buildings had stone foundations firmly

imbedded in the soil and made a part and parcel thereof; and that there were two wells and some fencing on said land. These improvements, at least, belonged to the property, and allegations of facts, from which ownership of the property appeared, alleged also, in effect, ownership of these improvements.

Defendants in error point out that, in several of the cases cited by plaintiffs in error to the point that a person acquiring land from the government takes such improvements as are thereon at the time of entry, the land had been *sold.* We fail to see, however, that one who accepts the government's offer to convey land to him, on the performance of prescribed conditions, has any less right to the improvements on the land, so long as he is complying with the conditions of the offer, than does one who accepts the government's offer to sell for cash.

Counsel for defendants in error contend that improvements may be removed, within a reasonable time, by the persons who placed them upon the land. That may be so, but there is here nothing to indicate that the defendants made claim to the improvements. The complaint charges them with having wantonly and maliciously destroyed the buildings, etc., with intent to injure the plaintiffs. If the defendants have grounds upon which to justify the carrying away of the materials, they should set the fact up in answer. No presumption to that effect will be indulged.

From the complaint it clearly appears that the improvements had been on the premises at least four years, and all that time in possession of plaintiffs or their son; and they, having possession, have a right of action against any one who disturbs such possession to their damage.

It is settled law that one who has obtained a patent for land entered by him has a title which relates back to his entry; and he may recover for injuries to the property between the date of entry and the issue of the patent. *M. & P. P. Ry. Co. v. Harris,* 45 Colo. 185, 101 Pac. 61, 132 Am. St. 140.

If it be considered that under the allegation of the com-

plaint that the parties employed to work on and improve the place were in actual possession, the plaintiffs having full title to the fee would then have action for injury to the reversion.

The complaint stated a cause of action, and the demurrer should have been overruled.

The judgment is accordingly reversed.

Mr. Justice White and Mr. Justice Scott concur.

No. 8967.

BAPTIST CITY MISSION SOCIETY v. PEOPLE'S TABERNACLE CONGREGATIONAL CHURCH.

1. CHURCH TEMPORALITIES—Alienation of. A mere majority of an ecclesiastical society are not authorized to transfer its church edifice to a society of a different denomination, without consideration, with the effect to leave the first society without a church in which to worship, or means to provide one, even though the action be taken at meeting regularly called for the purpose.

2. EVIDENCE—*Conveyance of Lands—Purpose of not Expressed*, may be shown by evidence aliunde.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. HENRY E. MAY, Mr. HENRY B. BABB, for plaintiff in error.

Mr. THOMAS H. HOOD, Messrs. MURRAY & INGERSOLL, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

THIS controversy is between two religious corporations representing different religious denominations. It involves the ownership of what is called The People's Tabernacle, in the City of Denver. It appears that in 1884 the defendant in error was organized as The People's Tabernacle Congregational Church of Denver, and thus continued up to the time of this controversy. As per its name and articles of faith, it was understood to be what is termed a Congre-

gational church or society. It affiliated with the others of that denomination, and for a great many years received funds from the Congregational Home Missionary Society. In 1900 it acquired the land in controversy, and erected a church edifice thereon. The funds received for the purchase of other lots and buildings formerly owned by this society, as well as for these lots, and the construction of the building thereon were secured, some from its members, but principally by public donations through the efforts of its former pastor, the Reverend T. A. Uzzell, who devoted over a quarter of a century to the work carried on by this organization. There is testimony tending to show that, while many of those who made the largest contributions thus gave to him at his solicitation, upon account of their appreciation of his work, and their confidence in him, without regard to the denominational character of his church, and without any strings upon it—that is, as to how he or the organization was to use it. It was likewise shown that during the period in which practically all these funds were raised he was generally known and understood to be a Congregational minister, and that his church, while somewhat on the missionary order, was likewise recognized and understood to be a Congregational church. The record further discloses that under his pastorship the church, or mission, prospered and did much good in its community, and that at the time of his death, 1910, it was in a prosperous and healthy condition, both spiritually and financially; that it then had about $1,700.00 in its treasury; that the church property was of a value of about fifty thousand dollars, and was clear of incumbrance.

The record discloses that after Parson Uzzell passed away dissension arose among the membership of the church, occasioned apparently by inability to raise money, with the result that thereafter, at a meeting purported to be called for that purpose, and by a vote of the membership present, being sixty-four for, and fifty-eight against, a deed was authorized to be executed for the property to the Baptist City Mission Society, which it is conceded is a part of the

religious organization known as the Baptist denomination. This deed contains certain conditions. One was that the Baptist societies would pay all the debts of the Tabernacle Church, which then had reached about $700.00, and also a special improvement tax against the property of about $1,700.00; other clauses provided for membership, under certain conditions, of the members of the church in the Baptist Society. It also, under certain conditions, permitted a re-sale of the property. The result of its conditions, as a whole, permitted of its entire future control by the Baptist Church, and of that creed and faith. Protests were made by many of the minority who were present at the meeting. Later eighty-two members of the church signed a written protest. This was ignored, the conveyance made, possession given, and the property turned over to the new organization. This suit was brought to have the deed declared void, for its cancellation, etc. Trial was to the court, which found that the attempted transfer was a diversion of the temporalities of the said defendant in error church, and was in violation of the trust under and by virtue of which said temporalities were held, and a breach of duty on the part of those attempting to execute said deed, for which reason it was ordered cancelled, etc.

The defendant in error urges many irregularities in the proceedings leading up to the execution of the deed, and lack of performance with its conditions, which its counsel contend are alone sufficient to have the transaction set aside. As we view it, these matters need not be gone into, but assuming, without so holding, that they were regular and sufficient in the respects complained of, the question then to be determined is, can a majority of those present at a meeting, called for that purpose, order the execution of a deed to their church property to another denomination, practically without consideration, thereby leaving their own church society without any church edifice, or other place within which to worship, and where the result of the transaction makes it practically a gift of the property from one denomination to another, leaving the grantor

organization with nothing for its members to do but to go into the other denomination, disperse, or again raise money with which to rent or buy another edifice within which to carry on its worship. In other words, can a majority, only, of those present at a meeting (although called for that purpose) of a church organization, of one denomination, turn its temporalities over to another denomination, for the use and benefit of the latter denomination, as here attempted? The trial court was of opinion that it could not be thus accomplished. We are in accord with this conclusion, which is supported by the great weight of authority. *Marien et al. v. Evangelical Creed Congregational Church,* 132 Wis. 650, 113 N. W. 66; *Roshi's Appeals,* 69 Pa. 463, 8 Am. Rep. 275; *Smith et al. v. Pedigo et al.,* 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; *Lindstrom et al. v. Tell et al.,* 131 Minn. 203, 154 N. W. 969; *Baptist Church v. Jones et al.,* 79 Miss. 488, 30 South. 714; *Mt. Zion Church v. Whitmore et al.,* 83 Iowa 138, 49 N. W. 81, 13 L. R. A. 198; *Landrith v. Hudgins,* 121 Tenn. 556, 120 S. W. 783; *Rottmann et al. v. Bartling,* 22 Neb. 375, 35 N. W. 126; *Franke et al. v. Mann et al.,* 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; *Baptist Church v. Baptist Church,* 46 N. Y. 131; *Everett et al. v. Jennings,* 137 Ga. 253, 73 S. E. 375; *In re Schnorr's Appeals,* 67 Pa. 138, 5 Am. Rep. 415; *Cape v. Plymouth Cong. Church,* 130 Wis. 174, 109 N. W. 928; *Watson v. Jones,* 13 Wall. 679, 20 L. Ed. 666; *Lemp v. Raven,* 113 Mich. 375, 71 N. W. 627; *Krecker v. Shirey,* 163 Pa. 534, 30 Atl. 440, 29 L. R. A. 476; *Brundage v. Deardorf,* (C. C.) 55 Fed. 839; *Baptist Church v. Jones,* 79 Miss. 488, 30 South. 714; *Berry v. Second Baptist Church,* 37 Okl. 117, 130 Pac. 585; 34 Cyc. 1167, 1169; *Madison Av. Baptist Church v. Oliver St. Baptist Church,* 73 N. Y. 82.

While it is true that the language in the deeds from the original grantors to the defendant in error for the lots in controversy does not contain a declaration pertaining to the use or the purposes for which they were secured, it is clearly shown that they were secured for these uses and

were being used for these purposes, and not otherwise. In such cases, the weight of authority is that when not set out in the deed, the purposes for which they were secured and being used can be otherwise shown to exist. *Landrith v. Hudgins,* 121 Tenn. 556, 120 S. W. 783; *Lindstrom v. Tell,* 131 Minn. 203, 154 N. W. 969; *Smith v. Pedigo,* 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; *Franke v. Mann,* 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; *Hale v. Everett,* 53 N. H. 9, 16 Am. Rep. 82.

The plaintiff in error cites numerous cases disclosing contentions between majority and minority stockholders of private corporations to sustain its position. They have no application to cases of this kind, where the denominational character of the churches or societies must, of necessity, enter into the controversy. Any argument which seeks to evade or get around this fact is not applicable to this controversy.

The judgment is affirmed.

Affirmed.

Mr. Justice Bailey and Mr. Justice Allen concur.

No. 9056.

BOARD OF COUNTY COMMISSIONERS OF LOGAN COUNTY v. ADVOCATE PUBLISHING COMPANY.

1. COUNTY—*Publication of Tax List—Liability.* Where certain names and descriptions are suppressed by direction of the treasurer, after the first publication, the publisher of the newspaper is not entitled to the full statutory price, as if the matter were published.

2. —— *Number of Publications.* The statute allows but four publications of the delinquent tax list. The county treasurer's order for a greater number is without effect to charge the county.

3. —— *Measurement.* The printer's compensation is to be computed by rule measurement, rather than by line. Twelve lines of the type of the prescribed size, and width of line, is the basis of the statutory inch.

In printing the display headings necessary blank spaces are to be paid for as if in solid type.

Error to Logan District Court, Hon. H. P. Burke, Judge.

Messrs. MUNSON, KEATING & MUNSON, for plaintiff in error.

Messrs. COEN, MORISON & SAUTER, for defendant in error.

Mr. Justice Scott delivered the opinion of the court:

THIS controversy arises over the amount to be lawfully allowed for the publication of a delinquent tax list, delivered to the publishing company by the County Treasurer for that purpose.

It appears that after the delivery of the list, and after the matter had been set in type, the County Treasurer directed the publisher to omit certain names and descriptions, which was done; and after the first publication, the County Treasurer directed the publisher to thereafter omit certain additional names and descriptions in future publications, which was done.

The County Treasurer directed the publisher to publish the final list in five issues of the paper, which was done.

The case was submitted on an agreed statement of fact. The court held that the publisher was entitled only to reasonable compensation for the setting up and distribution of the type as relates to that portion of the list not published, the value of which was agreed on. The publisher, however, insists that it is entitled to the statutory price as if published. The court did not err in this particular. That portion of the list was not published and the publisher was not entitled to the price for publication. What may have been the rights of the publisher if he had declined to comply with the County Treasurer's request, and had proceeded to publish the same, is not determined. He consented to and did act upon the request of the treasurer.

The publisher claims compensation for five publications, as directed by the County Treasurer. The court held that it was entitled only to compensation for four publications, being the number fixed by statute. In that the court did not err. Under the statute hereinafter quoted the County

Treasurer was authorized only to contract for the lawful number of publications, and he can not lawfully exceed his authority in that respect.

The principal controversy here is as to the construction of the statutory rule for measurement of public printing. The court held that this should be computed by rule measurement, rather than by line, as seems clearly to be the intent of the statute, as was determined in *Montezuma County v. Frederick,* 50 Colo. 464, 115 Pac. 514.

Section 3934, Revised Statute 1908, provides:

"Publishers of newspapers in this state shall be entitled to receive the following fees: For the publication of all legal advertising in newspapers required to be done by law in this state, publishers shall be paid at the rate of seven cents for each line of nonpareil, measure thirteen ems (pica) wide, for the first insertion, and four cents for each subsequent insertion. In ascertaining charges under the provisions of this act, twelve lines shall be counted to the inch, and all emblems, display headings, rule work and necessary blank space shall be paid for as if solid type. And any public or municipal officer or board created by or existing under the laws of this state that has now, or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements, is hereby authorized, subject to other limitations on said authority, now imposed by law, to agree to pay therefor prices not exceeding said rates."

It is clear that matter to be embraced in twelve lines of the prescribed size of type, and width of line, is the basis of measurement constituting the statutory inch, to be computed at the price fixed per line for the first and subsequent publications.

Whatever may be the size of type, or length of line used, the compensation must be upon the prescribed basis. This is usually computed by printers by deducting relative per cents from rule measurement, dependent upon the varying larger sizes of type used.

The court correctly interpreted the statute for the meas-

urement of display headings, by allowing necessary blank space to be paid for as if in solid type.

By reason of the erroneous ruling as to measurement, the judgment is reversed, with instruction to enter judgment in conformity with the views herein expressed.

The judgment is reversed.

Bailey, J., and Allen, Jr., concur.

No. 9380.

IN RE RAINBOLT.

1. LUNATIC—*Restoration of Reason—Jurisdiction to Discharge.* Every proceeding under c. 118 of the Laws of 1915, relating to lunatics, is open to modification in the court of original jurisdiction, on application of any party in interest, or in his or her behalf, even though no reservation is made in the order or decree.

   Petitioner having been declared a lunatic, and recovered her reason as she alleged, applied for the writ of habeas corpus, for her enlargement.

   Held that the matter was within the jurisdiction of the court in which the original proceeding was had, and for this reason the writ was denied.

2. SUPREME COURT—*Jurisdiction.* The Court will not entertain an original proceeding which involves a hearing of testimony, and determination of facts, where an inferior court has ample jurisdiction.

Petition for Writ of Habeas Corpus.

Mr. A. H. MORRISON, for petitioner.

Mr. ROBERT COLLIER and Mr. GEORGE Q. RICHMOND, for respondent.

Mr. Justice Bailey delivered the opinion of the court:

THIS is an original application for a writ of habeas corpus by Lucy Rainbolt, who claims to be unlawfully restrained of her liberty by defendant herein. It appears that Mrs. Rainbolt was adjudged insane by the County

Court of the City and County of Denver, in July, 1916, and committed to the care and custody of her husband until further order of the court. The writ is sought under section 2919, R. S. 1908, which is as follows:

"Second, where, though the original imprisonment was lawful, yet by some act, omission or event, which has subsequently taken place, the party has become entitled to his discharge."

Plaintiff claims to have recovered her reason, and relies upon a return to sanity as the "event which has subsequently taken place" to warrant this application. We are asked to assume original jurisdiction, take testimony and determine whether plaintiff is now sane. Such jurisdiction should not be exercised if the question may properly be determined, and the rights of plaintiff fully protected and enforced, in the County Court.

The hearing was had under chapter 118, Session Laws 1915, relating to the commitment and discharge of lunatics. The chapter sets out the procedure to be followed in the commitment of distracted persons, and for an accounting by the conservator when the incompetent shall be discharged as by law provided. Plaintiff contends that the provisions for the discharge of a person adjudged incompetent, contained in section 4130, R. S. 1908, are unconstitutional, and that therefore there is no way provided by which she can get relief except through this application.

It is unnecessary to pass upon the constitutionality of section 4130, as all proceedings, judgments and orders under chapter 118, Session Laws 1915, are of a continuing character, and open to change and modification on application of any party in interest in the court having original jurisdiction. Such proceedings are analagous to those appointing guardians, decrees awarding the custody of minors or payment of alimony in divorce cases, and like matters which are not within such judicial control as to make adjudications therein absolutely final. While such judgments and decrees are final in the sense that they determine matters then in controversy, and are subject to

review on error, they can not, in the very nature of things, be irrevocably conclusive. In the case of plaintiff the order of commitment was "until the further order of the court." Plainly the court had in mind the fact that other orders might become necessary and accordingly left the proceedings open; and whether the court did so or not, the case at all times would have been open for further action by the court to meet any exigency.

Such proceedings may be reopened upon petition of the next friend of the party in interest. *Wood v. Throckmorton,* 26 Colo. 248. Or such petition may be presented by the conservator or guardian. If the interests of the latter are antagonistic, or should they fail or refuse to act, plaintiff herself may institute such proceedings. In *Weisman v. Donald,* 125 Wis. 600, 104 N. W. 916, reported in 2 L. R. A. (N. S.) 961, the common law right of a lunatic to be heard in his own behalf is discussed as follows:

"Again, in *Rankin v. Warner,* 2 Lea 302, it is said: 'The law mainly designs to protect the weak and dependent, and if the courts, seeing a suitor has rights or property entitled to their consideration and judgment, turn him out because no one will or does assume the role of guardian or next friend for him, they will certainly be guilty of strange perversion of the object of their creation.' The common law right of a lunatic to maintain a suit was declared as long ago as Lord Coke's time, in *Beverley's Case,* 4 Coke, p. 568."

This rule was announced in a case involving property rights only. Manifestly it applies with even greater force where the liberty of the plaintiff is involved, and under it the petitioner may have the issue of her present sanity adjudicated by the County Court in the same manner that like disputed questions may be therein heard and determined.

The application for the writ is therefore denied, and plaintiff is remanded to her remedy in the County Court, which has full jurisdiction to hear and adjudge all ques-

tions involved. That court not only has jurisdiction to hear and determine, but it is its duty to do so.

Writ denied.

Decision *en banc.*

No. 9084.

GREINER ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF PARK COUNTY.

1. STATUTE—*Public Need not be Pleaded.* Bill to restrain the county from occupying certain lands as a public road. The answer claimed the premises "as such public highway....by full right and authority of law", Held that defendant was entitled to avail itself of the act of Congress of July 26, 1866, without pleading it.

2. PUBLIC LANDS—*School Section—Reservation of,* in the act for the erection of the territorial government did not take effect until a survey of the land under authority of the United States.

3. —— *Grant of Way—Acceptance.* The grant made by sec. 4919 U. S. Comp. Stat, 1916, of a way over the public lands for public highways, is accepted by public use and travel, while the lands still retain their public character; and subsequent purchasers take subject to the easement.

Error to Park District Court, Hon. James L. Cooper, Judge.

Mr. G. K. HARTENSTEIN and Mr. HARRY L. MCGINNIS, for plaintiffs in error.

Mr. M. I. O'MALIA and Messrs. DANA & BLOUNT, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court:

Plaintiffs, claiming to be the owners of section 16, township 11 south, range 76 west, of the sixth principal meridian, brought this action to restrain the commissioners of Park County, in which the land is located, from occupying a strip of land across the section for road purposes, alleging that the county had attempted to take the statutory steps to open a public highway across their land, but that

the proceedings were irregular and conferred no authority on the county to open such a road.

The county, answering, admitted that it claimed the strip of land as a public highway, alleging that it is claimed, used, held and occupied as such by the defendant by full right and authority of law. It admits the attempted statutory proceedings to establish a highway were insufficient, but alleges that the strip of land was used by defendant as a public highway, at the time of the commencement of this action, and for twenty years and more continuously prior thereto.

On the trial and before the introduction of any testimony the attorney for defendant announced that the county did not rely upon the statutory proceedings, which were admitted to be insufficient, for a dedication of the land, but relied upon a prior grant under the Act of 1866 of the Federal statutes. Thereupon plaintiffs introduced evidence establishing their title to section 16 under and by virtue of a patent from the State of Colorado of date December 24, 1908, and after showing that there was no public record of any road across the land, rested. Counsel for the county then made the following statement: "We claim a right to the road under the Congressional Act of 1866, giving and ceding to the public roadways over public domain that has not already been appropriated for public use. * * * We claim a right dating from the ownership of the government of this land, and under the Act of Congress of 1866." Evidence was then introduced showing that there had been a public traveled road across the premises of plaintiffs on the land claimed as a highway, as early as 1871, and that it had been continuously used as such from that time down to the date of the commencement of this action.

The court found in favor of defendant, entered a judgment of dismissal, and plaintiffs bring the case here on error, asking that the judgment be reversed, because:

First. The findings and judgment are based upon an issue not in the case, for the reason that defendant abandoned its right based upon the statutory proceedings to

establish a highway; abandoned its defense under the plea of adverse user for twenty years, and recovered under the Federal Act of 1866, which was not pleaded, and could therefore not be interposed as a defense, thereby constituting a fatal variance between the pleading and proof.

Second. That the Congressional Act does not apply to the land involved, because at the time of the passage of the Act of 1866, section 16 had been reserved for public use as school land, so that the right of way grant did not attach.

Third. The grant of a right of way over the land was not accepted while the land was a part of the public domain, or at all.

1. There is no variance established by the record between the pleading and proof. The answer alleges: "That the strip of land is claimed, used, held and occupied as such public highway by said defendant, by full right and authority of law." Before the trial, and again before the introduction of defendant's evidence, it was announced that defendant claimed the right to the road under the Congressional Act of 1866, which was sufficient to permit the introduction of proof to support this claim. It was not necessary to specifically plead the statute and there was no motion to make the answer more specific in this regard. This assignment, therefore, will be overruled.

2. Section 2477 of the U. S. statutes (U. S. Comp. Stat. 1916, § 4919), being the Act of 1866 to which reference has been made, reads as follows:

"The right of way for the construction of highways over public lands not reserved for public uses is hereby granted."

The organic act—approved February 28, 1861—providing a temporary government for the Territory of Colorado contains the following provision:

"Section 14. And be it further enacted, that when the land in the said territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall

be, and the same are hereby, reserved for the purpose of being applied to schools in the states hereafter to be erected out of the same."

It is the contention of plaintiffs that the Act of July 26, 1866 (Sec. 2477, U. S. Stats.), does not apply to the land involved, because, under the evidence, the earliest use of this road was in 1871, and that section 14, of the organic act, having been passed in February, 1861, reserving sections 16 and 36 for school purposes, took this section out of the purview of the statute, and at the time of the passage of the Act of 1866, section 16, here in question, was not public land.

It is not necessary for us, in this proceeding, to determine whether or not sections 16 and 36, commonly called school sections, were reserved for public use within the meaning of the term as used in section 2477. Section 14 of the organic act of 1861 says they are reserved for school purposes, but in construing it we must give effect to the entire section. When does the reservation take effect? The first clause of the section answers the question: "When the land in said territory shall be surveyed under the direction of the government of the United States." Clearly, until the survey was made, there was no reservation, because it was impossible to tell what particular part of the public domain would constitute sections 16 and 36, consequently the land in question would be a part of the public domain until the survey, at least. Plaintiffs introduced no evidence tending to show that a survey was made by the government prior to the inception of the road, and as a matter of fact, the government survey of this particular tract was not made until November, 1872. If, therefore, a right of way for the highway was granted over the public domain in 1866, and the grant was accepted and the road laid out and used prior to November, 1872, section 2477 would apply.

3. Being of the opinion, as we are, that section 2477 is applicable to this case and that there was a grant of a right of way for a highway over the public domain here

involved, the remaining question is, was there an acceptance of the grant while the land was still a part of the public domain. Plaintiffs contend there was not.

Section 2477 (being Sec. 4919, U. S. Compiled Stats. 1916) is an express dedication of a right of way for a road over public lands not reserved for public use. The acceptance of the grant was effected by public user while the land was a part of the public domain. An appropriation in this manner was made with the consent of the government, previously given, and when confined to a reasonably certain and definite line, created an easement for the purpose of a highway, and subsequent claimants took such land subject to that easement. *Sprague v. Stead*, 56 Colo. 538, 139 Pac. 544.

The court found that the right of way was dedicated for this road by the Congressional Act of 1866; that the dedication was accepted by the public while the premises and line were a part of the public domain not reserved for public uses, by the actual and continuous use thereof by the public; and that it had been constantly and continuously used as and for a public highway since its inception. We think there was sufficient evidence to support these findings and the judgment will be affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott concur.

No. 8906.

JULESBURG IRRIGATION DISTRICT v. HARMONY DITCH COMPANY ET AL.

CONTRACTS—*Construed.* The Harmony Land Company being the owner of the Harmony canal and certain lands irrigated therefrom, entered into a contract, in which one Camfield was party of the first part, the Land Company party of the second part, and the Julesburg Irrigation District party of the third part.

The agreement provided that Camfield should enlarge and lengthen the ditch for the benefit of the District, and that the Land company on completion of the work, would convey to him such

right in the canal as he would have secured by condemnation proceedings, but that the award of 252 second feet, priority which had been decreed to the Land Company, should remain, unimpaired, as the property of that company.

The contract containing provision to the effect that the Land Company was entitled to the use of the water decreed to it whenever that volume was required, "for direct irrigation of the lands now owned, or that may hereafter be acquired," by it, and should be entitled "to draw water from any part of the canal for direct irrigation, west of a specified section line; that the land company should be limited to one hundred feet, after reaching a certain other section line, and fifty feet after passing the line of still another section, and that for all other purposes Camfield should have the prior right to divert water through the canal for storage... particularly in the Julesburg reservoir."

The Land Company agreed to convey a right of way over its lands for the enlargement, but with the reservation that in the conveyances, it should "reserve to itself... the appropriation and priority of said Harmony canal to the extent of 252 cubic feet per second of time" and "a perpetual easement" for carrying through the canal, "all the water covered by said priority;" and it was "expressly understood" that, "regardless of any conveyance of the canal" "the right to water... for irrigation," should be "enjoyed by said party of the second part, as heretofore."

Held that the Land Company retained without limitation or abridgement the priority which had been decreed to it. Standing prior to the above provision last quoted, there was a provision that the Land Company "has the prior right of storage ...only for the purpose above described," and that for all other purposes Camfield and his assigns should "have the prior right to divert water through said canal for storage." *Held* not a conveyance nor an agreement to convey any part of the Land Company's decreed priority.

Error to Logan District Court, Hon. H. P. Burke, Judge.

Mr. H. N. HAYNES, Mr. C. M. ROLFSON, Mr. H. D. ROBERTS, for plaintiff in error.

Messrs. ALLEN & WEBSTER, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court:

THE case is here to review an order sustaining a demurrer to the complaint of The Julesburg Irrigation District against The Harmony Ditch Company and others. Defendants elected to stand by their complaint, and a judgment of dismissal was entered. We designate the parties as they appeared in the court below.

The issues arise out of a tri-party contract entered into between one Camfield, The Julesburg Irrigation District and The Harmony Land & Stock Company, regarding the enlargement of a ditch in the Julesburg Irrigation District. The ditch was the property of The Harmony Land & Stock Company, and carried a decreed water right of 252 second feet for irrigation purposes. Camfield, a contractor, first party to the contract, agreed with the owner of the water right, party of the second part, to enlarge and lengthen its ditch, for the benefit and use of The Julesburg Irrigation District, party of the third part. Among other things, the contract provides that the owning company should pay Camfield or his assigns $500.00 per year as a maintenance charge, reserving the first right to the use of such decreed right. By the express terms of the contract the priority and right to use was reserved by The Harmony Land & Stock Company, regardless of any transfer of the canal, or of any right thereto, such right of priority and use to remain in and be enjoyed by the owning company as theretofore. Also that when Camfield should complete the work, The Harmony Land & Stock Company should then convey to him such right, title and interest in the canal as he would have secured in it by condemnation proceedings, but that the decree of 252 cubic feet of water per second of time should remain unimpaired as the property of The Harmony Land & Stock Company, and also that all covenants and agreements to be performed by the first and third parties thereto should extend to and be enjoyed by the successors and assigns of such company.

The work was completed and transfers made according to agreement. Later the lands owned by The Harmony Land & Stock Company were sold to others, and the rights

of the company under the enlarged ditch were conveyed to a corporation, The Harmony Ditch Company, one of the defendants herein, the stock of which is divided into 1,250 shares, each share carrying the right to water from the enlarged ditch for ten acres of land.

It is contended by plaintiff that by the terms of the contract The Harmony Land & Stock Company was limited to the use of water upon its lands lying west of a certain boundary line, approximately 5,000 acres, and also that it had the right to use only so much of its priority upon such lands as was sufficient to properly irrigate them, and none other, and in case of a surplus or excess of water for such use, such excess was to go to the plaintiff. This theory is based upon that part of section 8 of the contract which reads as follows:

"It is further mutually understood and agreed that the said party of the second part has the right to the use of 252 cubic feet of water per second of time whenever said amount is required for the use of said party of the second part for direct irrigation of the lands now owned, or that may be hereafter acquired by the said party of the second part, lying under the line of said Harmony No. 1 and Julesburg Extension Canal, as herein provided, whenever said water is turned into said canal at the point of intake from the river or by feeders, and the said party of the second part shall have the right at all times to the carriage and to draw water from any part of said canal for direct irrigation as aforesaid, west of the section line running north and south between sections 21 and 22-11-48."

After providing that the right of the land company to the water shall be limited to 100 feet after reaching the center line of section 2-10-49, and to 50 feet after passing section line 22-11-48, and for rights of the land company to store water, the contract continues as follows:

"And that for all other purposes said party of the first part and his assigns shall have the prior right to divert water through said canal from the South Platte River for storage purposes, and particularly for the purpose of stor-

age in the Julesburg reservoir belonging to the party of the first part."

Defendants contend that the above clauses of the contract refer only to the points at which water may be drawn from the canal for direct irrigation, and not to the location of the land upon which it may be used, and that the restrictions apply only to water for storage purposes. They claim that the land company conveyed to the district only such right in the ditch as the district might have secured by condemnation proceedings, and in support of their position rely on the following provision of the contract:

"The said party of the second part will, at the request of the said party of the third part, in writing, and subject to all construction claims, convey to the said party of the first part, to-wit, (1) such right, title and interest in and to the said Harmony Canal No. 1 as the said party of the first part would acquire in it, in its present condition, by reason of condemnation proceedings brought to enlarge the same for his use."

The land company agrees to convey a right of way over its lands for the enlarged canal, and then a reservation is made by the contract in these words:

"And it is expressly understood and agreed that in said conveyances the party of the second part shall reserve for itself the ownership of the appropriation and priority of said Harmony Canal No. 1 to the extent of 252 cubic feet of water per second of time, and a perpetual casement of carrying and having delivered through the same all the water covered by said appropriation and priority, to the end that the decree of 252 cubic feet of water per second of time of the said Harmony Canal No. 1 shall remain unimpaired as the property of the said party of the second part, it being expressly understood, regardless of any transfer or conveyance of said canal, and the joint use thereof, the right to water from the South Platte River for irrigation shall be enjoyed by the said party of the second part as heretofore, and that the said party of the second part

shall have and enjoy a senior appropriation for storage as herein limited."

If the theory of plaintiff is correct, it must be because the contract between The Harmony Land & Stock Company and Camfield restricts the use of the water to lands owned and irrigated by that company before the contract was made; or else that, by the contract, such company conveyed a portion of its priority to Camfield, and the district as the successor of Camfield. The restrictions, if any, consist solely in confining the use as above indicated. It is claimed that the use is limited by the clause, "for the irrigation of the lands now owned by the party of the second part, or hereafter acquired by said party of the second part." This provision read in connection with other parts of the contract, wherein are precisely defined and set what the company agrees to convey, must be regarded as defining the right, rather than as a limitation upon it. This provision not only does not limit the right, but is a definite expression of an unlimited right. The language to the effect that the company retains the right to the use of the water, "as heretofore," is indicative of an intent to retain all rights, unlimited and unabridged, under the priority. To hold that by the language quoted the company intended to restrict itself in the use of water under its priority is contrary to reason, or logical construction. In fact, there seems to be nothing whatever in the contract which even suggests a restriction of the use of this right for direct irrigation; the only possible limitation is upon the distance the water shall be carried, as indicated by this language of the contract:

"And said party of the second part shall have the right at all times to the carriage and to draw water from any part of said canal for direct irrigation, as aforesaid, west of the section line running north and south between sections 21 and 22-11-14; provided, that no more than one hundred cubic feet of water per second of time shall be carried in said canal from the north and south center line of section 2-10-49 eastwardly to the main lateral east of said section,

and no more than fifty cubic feet per second eastwardly from such point, for said purposes."

The second hypothesis, that the land company conveyed a part of its priority to the district, is based upon that section of the contract which, after providing for the use of water for storage by the parties, and limiting the location of reservoirs to certain positions, is as follows:

"It being expressly understood and agreed between the parties hereto that the said party of the second part has the prior right of storage from the South Platte River as among the parties hereto, only for the purpose above described, and for all other purposes said party of the first part and his assigns shall have the prior right to divert water through said canal from the South Platte River for storage purposes."

That the above section refers only to the acknowledged limitation for storage purposes is clear from the fact that in the following section is the provision relating to the right which the company agrees to convey, quoted above, reserving all rights in the priority for direct irrigation. The contract, read as a whole, contains nothing which can fairly be construed as limiting the company in any way in the use of water under its priority for direct irrigation, except the provisions relating to diminished amounts to be drawn from the ditch upon increased distances from the intake thereof, and the limitation for storage purposes as above set out.

There is no merit whatever in the contention that the land company could not sell its lands, and convey its rights under the priority to other persons.

No error appearing in the record the judgment of the trial court is affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9085.

KOUCLES *v.* THE PEOPLE.

CRIMINAL LAW—*Keeping Gambling Rooms.* The keeper of a pool hall licensed by a city, knowingly permitted several games for money to be played in his hall. *Held* liable to conviction under Rev. Stat. sec. 1790.

Error to Las Animas District Court, Hon. A. Watson McHendrie, Judge.

Mr. EARL COOLEY, for plaintiff in error.

Hon. FRED FARRAR, Attorney-General, Hon. LESLIE HUBBARD, Attorney-General, Mr. RALPH E. C. KERWIN, Assistant Attorney-General, for defendant in error, The People.

Opinion by Mr. Justice Allen.

THE plaintiff in error was convicted of keeping a gambling room. The prosecution was brought under section 1790 R. S. 1908 (Sec. 1922 Mills Ann. Sts. 1912), which provides, among other things, that "if any person shall keep any room * * * to be used or occupied for gambling, or shall knowingly permit the same to be used or occupied for gambling," he shall be fined or imprisoned, etc.

The information upon which defendant was tried contained one count, and alleged, in substance, that the defendant on March 4, 1916, at and within the county of Las Animas, kept a certain room, building and tenement to be used and occupied for gambling, and "did then and there unlawfully and knowingly permit the said room, building and tenement, so kept by him as aforesaid, to be used and occupied for gambling."

The assignments of error, to the extent that the same are argued, relates entirely to the sufficiency of the evidence to sustain a verdict of guilty.

The evidence shows that at the time named in the information, the plaintiff in error, defendant below, operated a pool hall in Trinidad. On the date mentioned two men played several games of "pay-ball" pool in the defendant's

place of business. In each of such games the players played for money. This was gambling on their part. *Everhart v. People,* 54 Colo. 272, 274, 103 Pac. 1076.

While the defendant denied having knowledge of the fact that the players were playing for money, there was evidence that he was aware of the fact and that he permitted the players to gamble.

It is not disputed that the evidence shows that the defendant was licensed to conduct a pool hall. This matter is dwelt upon at some length by plaintiff in error in his brief, but it is not shown, either in the argument or by the authorities cited, that this situation is material. The defendant while authorized under his license from the city of Trinidad to conduct a pool hall, was not thereby authorized to permit pool games to be played as gambling games. *Barker v. The State,* 12 Tex. 273. "The licensing of a pool or billiard table does not authorize betting at such table." *Hopkins v. State,* 122 Ga. 583, 50 S. E. 351, 69 L. R. A. 117, 2 A. & E. Ann. Cas. 617.

It is argued, or at least strongly intimated, in the brief of plaintiff in error, that a pool hall cannot be a "gambling hall," or a room kept or permitted to be used or occupied for gambling. It is universally held, however, that a proprietor of a pool hall is guilty of keeping a gaming house if he permits the players to play pool games for money. 12 R. C. L. 735, sec. 37; *State v. Book,* 41 Iowa 550, 20 Am. Rep. 609; *Hamilton v. The State,* 75 Ind. 586; note, 121 Am. St. Rep. 695, 19 L. R. A. (N. S.) 913.

The evidence was sufficient to support the verdict, and the judgment is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9210.

THE PEOPLE v. KIPPY.

CRIMINAL LAW—*Writ of Error by The People.* The accused being acquitted, the court will not entertain a writ of error on behalf of the people, merely to determine the sufficiency of the evidence to warrant a conviction, where it is improbable that a similar state of facts will again be presented, so that a consideration of the testimony, and any declarations upon it, will neither establish any principle of law or be a guide in subsequent prosecutions.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. IRVING VAN BRADT, Assistant Attorney General, for The People.

No appearance for defendant in error.

Chief Justice Hill delivered the opinion of the court.

THIS writ of error on behalf of the People, brought by the Attorney General at the request of the District Attorney of the Seventh Judicial District, is for the purpose of having reviewed the ruling of the District Court in taking the case from the jury upon account of the alleged insufficiency of the testimony.

The defendant was charged with the crime of burglary. The question sought to be reviewed is whether the evidence, which is circumstantial, was sufficient to justify a conviction. To sustain their position, the people have set forth a great deal of the testimony and commented upon it.

Section 1997, Rev. Stats., 1908, provides that writs of error shall lie upon behalf of the people to review decisions in criminal cases upon questions of law arising upon the trial, motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment or where a statute is declared unconstitutional. This is followed with a proviso that nothing in the act shall be construed so as to place a defendant in jeopardy a second time for the same offense. This defendant cannot be again tried for the

crime charged in the information. There is nothing in the testimony to make it specially applicable to other cases which may follow. It is improbable that a similar state of facts will arise in another case, hence, a consideration of the testimony and a declaration concerning it, would not establish any real principle of law, or be of any assistance, or act as a guide in future burglary cases, for which reasons we cannot conceive, by the language used, that the legislature intended to provide for what would be a useless review of a state of facts as here presented.

The writ of error will be dismissed.

Writ dismissed.

Decision *en banc.*

Mr. Justice Teller not participating.

No. 9068.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* WHEATLEY.

1. RAILWAY COMPANY—*Fencing Track—Statute Construed.* Under chapter 135 of the Acts of 1911 injury by a locomotive to an animal upon the tracks of a railway is *prima facie* evidence of negligence.

2. DAMAGES—*Must be Established, by Evidence,* that the plaintiff a layman ignorant of the rules of procedure in court of justice assumed to manage his own cause affords no ground to relieve against the effect of this omission.

Error to Pitkin County Court, Hon. James J. Flinn, Judge.

Mr. E. N. CLARK and Mr. GEO. A. LUXFORD, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

THIS action was brought by Wheatley in a justice of the peace court, against the Denver and Rio Grande Railroad Company, to recover damages claimed to have been occa-

sioned by one of the company's trains, which it is alleged ran into and injured his cow.

1. There are no written pleadings. A trial in the County Court on appeal resulted in a judgment for plaintiff, and defendant brings the case here on error. Plaintiff was not represented in the court below by counsel and does not appear here.

It is the contention of the company that no negligence was shown on the trial; that the evidence does not support the judgment; and that there is no proof of any damage.

Plaintiff's evidence was very meager and unsatisfactory; but defendant supplemented it by showing that the animal was struck and shoved off the track by one of its engines.

The stock killing statute, S. L. 1911, p. 400, contains among others, the following provisions:

Section 1 requires every railroad company to fence its railroad and to construct and maintain cattle guards at public crossings amply sufficient to prevent livestock from getting on the railroad, except within the limits of incorporated towns and cities, the yard limits of established stations, or at public road and highway crossings.

Section 2 makes every railway company failing to enclose its railroad with such fences and guards, absolutely liable for all live stock, running at large, killed or injured by the engines or cars of the company.

Section 3 provides, if the railroad is enclosed with good and sufficient fences capable of keeping animals off the track, the company may plead and prove the same as a defense to any action for animals killed within the enclosure.

Section 4 makes the killing or injury of an animal by coming in contact with any engines or cars, *prima facie* evidence of negligence, and says the company shall be liable for the full damages occasioned by the killing or injury of such animal, unless it shall affirmatively show that the killing was not caused by its negligence.

This statute makes the mere happening of such an accident, *prima facie* evidence of negligence on the part of the

railroad company, and when the evidence established that plaintiff's animal was injured on the railroad track by an engine of the defendant, a *prima facie* case of negligence was made, and plaintiff could recover the amount of damages proven. The company did not overcome this *prima facie* case or presumption of negligence by presenting and establishing by competent proof, any of the defenses which the statute says it may interpose to such an action. It was the duty of the defendant to introduce any evidence it had, showing why plaintiff should not recover on the prima facie case made. It failed to offer any testimony to the effect that it had complied with the statute; therefore, the objection that no negligence was shown, is without merit.

2. The next assignment, that the evidence is insufficient to support the judgment, will have to be sustained, because the record is silent as to the amount of damages. Had there been any competent evidence to sustain the finding of the court upon this point, we would affirm the judgment. The case furnishes an illustration of the unfortunate situation which almost invariably arises when a layman attempts to conduct his own case in court. Of necessity he is ignorant of the legal rules of practice and procedure which must be observed and followed in the trial of cases, but we cannot, because of that fact, disregard and set them aside.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9032.

GRATER v. LOGAN HIGH SCHOOL DISTRICT ET AL.

1. PARTIES—*Indispensable.* Bill to restrain the levy and collection of taxes upon the properties within a certain high school district, to pay the interest on bonds of the district, alleging as ground of the relief prayer, irregularities in the election author-

izing the issue of the bonds. The holders of the bonds, being unknown, were not joined. *Held* that the bond holders were indispensable parties, and if service of process upon them cannot be had the bill must be dismissed.

2. TAXES—*Injunction to Restrain Collection*, should be granted, only under unusual conditions, and after notice to all parties in interest.

3. MUNICIPAL BONDS—*Presumptions to Support.* Where not negatived by the pleadings assailing the bonds of a school district for irregularity, it will be conclusively presumed that the bonds, on their face, recite compliance with all statutory requirements.

4. —— *Recitals—Effect.* Innocent purchasers of such bonds, for value, before maturity, are entitled to rely upon the recitals thereof, as against allegations of irregularity in the issue. Under these circumstances the School District, as well as individual tax payers, are estopped to deny the regularity of the issue.

Error to Logan District Court, Hon. Haslett P. Burke, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Messrs. PERSHING, TITSWORTH & FRY, Messrs. MUNSON & MUNSON, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an action to enjoin the collection of a tax levied by the Board of County Commissioners of Logan County upon the taxable property within the Logan County High School District, for the purpose of paying interest on bonds of the District, and to prevent future tax levies for the payment of interest and principal thereof. Plaintiff below, plaintiff in error here, is the taxpayer of the district, and brought suit on behalf of himself and all others like situated. A motion by defendant to exclude all testimony offered by plaintiff, and to dismiss the complaint because of its failure to state a cause of action and for numerous other reasons, was sustained.

Plaintiff brings the judgment here for review. The parties are designated as in the court below.

As ground for the relief prayed plaintiff sets forth alleged irregularities in the statutory proceedings relative to the special elections upon which the bond issues are based, and claims that these irregularities were of a character and nature to invalidate the bonds. Also that he has no adequate remedy at law.

Relief by injunction is a summary remedy, and should not be granted for threatened invasion of property rights except under unusual conditions. 14 R. C. L. 307. Neither should it be granted without notice to all parties in interest. Here it is sought to enjoin the High School District as a corporation, and the County Commissioners and others as officers of Logan County. The bond holders are not joined; probably because as stated in the pleadings no service of process could be had upon them. Nevertheless, it is manifest that the bond holders are not only proper parties, but absolutely necessary and indispensable parties. As matter of fact, the school district, and the county officers, are but nominal defendants, with only a casual interest in the outcome of the application. The bond holders alone are immediately and substantially affected. To grant the relief asked would be to render their bond holdings mere scraps of paper, and this without due, or any, process of law so far as their right to a day in court is concerned. As is stated in the syllabus of *Ribon v. R. R. Co.*, 16 Wall. 446, 83 U. S. 446, 21 L. Ed. 367:

"The rule in equity as to parties defendant is, that all whose interest will be affected by the decree sought to be obtained, must be before the court, and if any such persons cannot be reached by process, the bill must be dismissed."

It appears from the complaint that the bonds are now in the hands of unknown third parties. In such circumstances the bond holders being necessary parties, the great weight of authority is against the granting of injunctive relief: 14 R. C. L. 325; *City of Anthony v. State,* 49 Kan.

246, 30 Pac. 488; *Carpenter v. Hindman,* 32 Kan. 601, 5 Pac. 165; *Stallcup v. Tacoma,* 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; *Hope v. Mayor,* 72 Ga. 246; *Ramsey v. Marble Rock,* 123 Iowa 7, 98 N. W. 134; *Savage v. Sternberg,* 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751.

The bonds involved are negotiable instruments. The law authorized their issuance under certain circumstances and conditions. They contain recitals, according to the pleadings, to the effect that all statutory requirements preliminary to issue have been fully complied with. In any event, since this is not negatived by the averments of the complaint, it must be conclusively presumed that the bonds contain such recitals. As against the alleged irregularities innocent purchasers of the bonds for value before maturity have a right to rely upon such recitals and representations, and under the circumstances here disclosed upon principle and authority the district and individual taxpayers are estopped to deny their regularity.

City of Cripple Creek v. Adams, 36 Colo. 320, 85 Pac. 184; *Hayden v. Town of Aurora,* 57 Colo. 389, 142 Pac. 183; *Town of Aurora v. Gates,* 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915 A, 910; *Independent School District v. Rew,* 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; *Pana v. Bowler,* 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Brooklyn v. Aetna Life Ins. Co.,* 99 U. S. 362, 25 L. Ed. 416; *Township of Empire v. Darlington,* 101 U. S. 87, 25 L. Ed. 878.

The election to authorize the first issue of bonds was held in February, 1910, and that for the second issue during the following year. The irregularities alleged were as apparent immediately after such elections as they were in 1914, when this suit was brought. Neither plaintiff nor any other taxpayer took seasonable, or any, steps to prevent the issue and sale of the securities. The bonds were sold at par, and the proceeds used by the district for construction of buildings, and other improvements, for the benefit of all the taxpayers and inhabitants thereof. Under the admitted facts plaintiff should not now, in this indirect and collateral way, be permitted to question their validity.

If the sufficiency and regularity of these bonds may, at this late day, be questioned at all, it only can be done in a direct proceeding, brought for that purpose, to which all persons in interest are made parties.

Upon the question of enjoining the collection of taxes this court, in *Nile District v. English*, 60 Colo. 406, at page 412, 153 Pac. 760, 762, a like case to this, said:

"Upon a full consideration of public interest, of judicial pronouncement in general upon the subject involved, and of our statute, Sec. 5750, R. S. 1908, which affords a complete remedy in a proper case, we are of opinion that it is rarely possible, and then under most exceptional and unusual circumstances, that a cause of action to restrain the collection of taxes can be stated of which equity will or ought to take cognizance. In this case nothing is averred to negative the conclusion that plaintiff, if aggrieved, has a plain, adequate and speedy remedy at law, to which she should be remanded."

There is no exceptional or unusual conditions alleged in the complaint which takes the case out of this rule. For the several reasons suggested the judgment of the trial court should be and it hereby is affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

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ABATEMENT.

Prior Action Pending, is no plea where the first action is discontinued before the trial of the second. *Capp v. People*, 58.

ACTION.

When Lies. A cause of action which has arisen upon a government contractor's bond given under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, in favor of persons supplying a government contractor with materials in the prosecution of work under the "Reclamation Act" (Act June 17, 1902, Chap. 1093, 32 U. S. Stat. at Large, p. 388), need not wait the outcome of a suit upon the same bond in favor of the United States. *McPhee v. United States*, 421.

APPEAL AND ERROR.

See PRACTICE IN ERROR.

ATTORNEY GENERAL.

People's Case—Confession of Error. Where in the opinion of the Attorney General error was committed in the trial of one accused of crime, it is his duty, in the interest of public justice, to confess it. *Soto v. People*, 528.

BAIL.

Surrender of Principal. Bail who surrenders his principal before final judgment upon *sci. fa. is exonerated* (Rev. Stat. sec 1948). *Scott v. People*, 396.

BANKRUPTCY.

Debts Dischargeable—United States. Under Bankruptcy Act (Act, Cong. July 1, 1898, Chap. 541, 30 Stat. 544), liability as a surety on a government contractor's bond to the United States is dischargeable. *McPhee v. United States*, 421.

BILL OF LADING.

See COMMON CARRIER.

BILLS AND NOTES.

Description of Payee. That a check was payable to "The Royal Consulate of Italy", was held not to make it payable to bearer. *Scala v. Miner's Bank*, 185.

Any description of the payee by which he is reasonably identified is sufficient to bring the case within the protection of the rule against payment upon a forged endorsement. *Id.*

Promissory Note—Holder in Due Course. Harrell, President of the German Company, to induce defendant to purchase stock in that company, promised him that if he would make the purchase, executing his promissory note for the amount, due in sixty days, he should be elected treasurer of the company, and that the company would retain his note, and renew it from time to time, until his salary as treasurer should discharge the amount due thereof.

Sethman, relying upon this promise, executed his note in ordinary form, and delivered it to Harrell, but he was not elected treasurer of the company, and never received the stock. The German Company, by Harrell as president, presently indorsed the note in blank, and delivered it to Mitchell, treasurer of that company, and Mitchell thereupon borrowed of plaintiff the sum of $3,000, executing his own note therefor at ninety days, and pledging defendant's note, then still immature, as collateral security. The $3.000 was borrowed to pay commissions on the sale of stock to defendant, and was applied to that purpose, though Mitchell, who was entitled to a share of it, in fact received nothing. Action of plaintiff against defendant upon his promissory note. There was no evidence that plaintiff in accepting the note had notice of any want of consideratiton or took the note in bad faith in fact. Judgment for defendant reversed and judgment for plaintiff ordered. *Burnham Co. v. Sethman*, 189.

Bad Faith Defined. Plaintiffs knowledge, at the time of accepting the note, that Mitchell was treasurer of the payee, inasmuch as in pledging the note he exercised no function of that office, held no evidence of bad faith on the part of plaintiff, and insufficient to warrant any inference thereof. *Burnham Co. v. Sethman*, 189.

Duty of Inquiry. One offering negotiable paper fair upon its face, and not due, is under no duty to inquire of the maker as to its validity. *Id.*

Nor was plaintiff in this case under duty to inquire of the directors of the German Company, as to the right of Mitchell to dispose of the note. *Id.*

BILL OF LADING.

Limitation of Value. A common carrier who fails to deliver goods committed to him for carriage is responsible for no more than the value of the goods specified in the bill of lading. (Laws 1910, c. 5, sec. 8.) *Denver Co. v Teufel*, 515.

The provision of the statute reserving to the shipper "any remedy or right of action which he had under existing laws," does not impair the effect of the preceding provision limiting the carrier's liability to the value stated. *Id.*

Statement of Value by Shipper's Agent. An agent having the authority to make shipment of goods has authority to make a statement of their value, even though he has no knowledge of the actual value. *Id.*

Like ignorance of the carrier's agent is immaterial.

Rights of Assignee. The delivery of a bill of lading is a symbolic delivery of the goods. As between a bona fide assignee of a bill of lading, and a creditor who seeks to stop the goods in transit, the equity of the assignee prevails. *Painesville National Bank v. Hannan*, 301.

BROKER.

See REAL ESTATE BROKER.

CHARITIES.

Charitable Association—Charter Construed. Defendant was an association of the officers and employees of a railway company, incorporated under Gen. Laws 1877, sec. 224. The purpose, as stated in the articles of association, was, by the collection of monthly dues from the members, to create a fund for the relief of diseases and injuries of its members, to equip and maintain hospitals, employ physicians and surgeons, and purchase medical and hospital supplies. In the year of its organization, the association constructed and has ever since maintained a hospital, and two surgeons were placed in charge thereof, at slender and insufficient salaries, which have never been increased; and in order to induce competent surgeons to accept these positions, the directors permitted them to admit patients, not members of the association, paying the association the regular and customary hospital charge, and paying the surgeon such fee as the two might agree upon. No non-member patient was ever admitted to the detriment of the member patients, and none of the funds of the association were applied to the treatment or maintenance of the non-member patients. *Held*, that the admission of the non-member patients was, by implication, within the general scope of the purposes of the association, and as there was no express restriction, the practice was not *ultra vires*. *Denver & Rio Grande Employee's Association v. Rishmiller*, 306.

CHILDREN.

Duty of Parent to Support. Under c. 179 of the acts of 1911 the father of an illegitimate child, who, without lawful excuse, fails to provide for its support and education is guilty of felony. *Pearman v. People*, 26.

CHURCHES.

Temporalities—Alienation of. A mere majority of an ecclesiastical society are not authorized to transfer its church edifice to a society of a different denomination, without consideration, with the effect to leave the first society without a church in which to worship, or means to provide one, even though the action be taken at meeting regularly called for the purpose. *Baptist Society v. People's Tabernacle Church*, 574.

CIVIL SERVICE.

Warden of Penitentiary. Under c. 51 of the Acts of 1915 the office of warden of the penitentiary is not in the classified service. The Governor has power to remove the incumbent, without consent of the Civil Service Commission. *Capp v. People*, 58.

CONSTITUTIONAL LAW.

Title of Statute. Sec. 1, art. V., of the Constitution must receive a reasonable construction. *Pearman v. People*, 26.

The title of the act being "An Act to compel men to support their children" a provision requiring the support of illegitimate children was approved. *Id.*

The statute requiring the father to support his illegitimate child is not invalidated by the omission to mention illegitimate children in the title. *Id.*

Due Process of Law. The charter of Denver of 1904 provides for the erection of park districts, and the acquisition of lands for public parks; and that when the cost of a park site is determined the clerk shall give notice by advertisement for ten days in a newspaper of general circulation, specifying the cost of the improvements, and the share apportioned to each lot or tract in the district, and that objections filed within sixty days will be determined by the supervisors, at its first regular meeting, after said sixty days. By sec. 300 it is provided that at the meeting specified the Board of Supervisors sitting as a board of equalization shall hear all such objections, and may recommend modifications of the apportionment, and the Board of Public Works may make such modifications as seem just, or confirm the first apportionment, and the court shall then assess the cost of the improvements against all real estate in the district. Bill to restrain the enforcement of an assessment against property of plaintiffs for the acquisition of lands as a park, the plaintiffs contending that by section 300 the Board of Equalization has power to suggest only alterations in the assessments, and property owners were thus without remedy. *Held* on the authority of Denver v. Londoner, 33 Colo. 104; Londoner v. Denver, 210 U. S. 373; Londoner v. Denver, 52 Colo. 15, that the provisions in question constitute due process of law, and that plaintiff having failed, after ample opportunity, to present their objections to the proper board, can not now be heard to question the regularity of the proceeding. *Farncomb v. Denver*, 13.

Construction—Its office and Limits. A legislative purpose does not take effect unless expressed in written words.

From this follows the cardinal rule of construction that the intent of the legislature must be found in the words of the statute. If this be clear, and capable of but one meaning, there is neither room nor necessity for construction, and it is the duty of the courts to enforce the law as written without consideration of its policy, justice, or wisdom. When the written words may reasonably have different meanings, then, and only then, may the court consider the general purpose of the enactment, to aid in solving the ambiguity. *Lindsley v. Denver*, 444.

Ex Post Facto Legislation. A statute punishing the failure to support an illegitimate child, held effective, where the child was begotten before the enactment of the statute. *Wamsley v. People*, 521.

Art. XX Construed. It was contended for the defendant that the office of Attorney of City and County of Denver, *ex officio*, if separate and distinct from the office of District Attorney, was a new office, without any prescribed salary, that the provisions of the existing charter and ordinances of the City of Denver were not "applicable" to the new conditions.

But the court were of the opinion that this was mere assumption, that *prima facie* all provisions of the former charter and ordinances were applicable, and that it was without authority to declare inapplicable any of such provisions, unless the inapplic-

ability was apparent from something in the constitutional amendment, that if the *ex officio attorney* of the city and county was not entitled to compensation for the services rendered in that capacity, he was, for the same reason, without any power or duty in that function, which was to impute to the framers of the constitutional amendment the supreme folly of creating an office without either duties or authority, and a municipal corporation without any officer authorized to represent it in the courts, and without authority to employ such officer.

The purpose of article XX, and the economies contemplated thereby considered and enlarged upon. *Lindsley v. Denver*, 444.

CONTEMPT.

Circulating Petition for the Recall of a Judge, is not. Marians 2 People, ante, followed. *Murray v. People*, 184.

CONTRACTS.

Construed. The purchaser of the properties of a newspaper publishing company agreed to assume "all current liabilities" of that corporation. He was bound for the rents accruing and to accrue, for which the newspaper company was responsible. *Shaffer v. George*, 47.

Two contracts relating to the same matter, the first in writing and the second in parol, and supplemental to the first, may both stand. *Bank of Center v. Cain*, 285.

The term of a lease was to begin at a day specified. The lessor agreed to make certain improvements, but the time of completion was not mentioned. *Held* that nothing to the contrary appearing in the words of the writing, the law presumes an intent that the improvements were to be made within a reasonable time. *Tremble v. Collins*, 464.

Defendant maintained a reservoir from which it delivered water to other corporations, the owners of lateral ditches, extending to a distance from the reservoir.

Plaintiff was entitled to water from the reservoir, to be delivered through one of the laterals. *Hood v. Burlington Co.*, 318.

A contract of the defendant declared that the water was to be used by plaintiff upon designated lands. *Held*, in view of a long established practice to the contrary, that this could not be construed as importing that defendant should convey the water to these lands, but rather to limit the area of land to be irrigated with a specified volume, and prevent the consumer from delivering any portion of it to others for other lands. *Id.*

Defendant executed his promissory note to plaintiff, agreeing therein to ship all fruits raised by him through the Association until his indebtedness was paid, and authorizing the Association to deduct from the net returns from the fruit an amount sufficient to pay the note. *Held* no privilege reserved to defendant but a provision for the benefit of the Association, and one which the Association, might waive. *Western Slope Association v. Devine*, 523.

The Harmony Land Company being the owner of the Harmony canal and certain lands irrigated therefrom, entered into a con-

tract, in which one Camfield was party of the first part, the Land Company party of the second part, and the Julesburg Irrigation District party of the third part.

The agreement provided that Camfield should enlarge and lengthen the ditch for the benefit of the District, and that the Land Company on completion of the work, would convey to him such right in the canal as he would have secured by condemnation proceedings, but that the award of 252 second feet, priority which had been decreed to the Land Company, should remain, unimpaired, as the property of that company.

The contract containing provision to the effect that the Land Company was entitled to the use of the water decreed to it whenever that volume was required, "for direct irrigation of the lands now owned, or that may hereafter be acquired," by it, and should be entitled "to draw water from any part of the canal for direct irrigation, west of a specified section line; that the land company should be limited to one hundred feet, after reaching a certain other section line, and fifty feet after passing the line of still another section, and that for all other purposes Camfield should have the prior right to divert water through the canal for storage...particularly in the Julesburg reservoir."

The Land Company agreed to convey a right of way over its lands for the enlargement, but with the reservation that in the conveyances, it should "reserve to itself . . . the appropriation and priority of said Harmony canal to the extent of 252 cubic feet per second of time," and "a perpetual easement" for carrying through the canal, "all the water covered by said priority;" and it was "expressly understood" that, "regardless of any conveyance of the canal" "the right to water . . . for irrigation," should be "enjoyed by said party of the second part, as heretofore."

Held that the Land Company retained without limitation or abridgement the priority which had been decreed to it. Standing prior to the above provision last quoted, there was a provision that the Land Company "has the prior right of storage . . . only for the purpose above described," and that for all other purposes Camfield and his assigns should "have the prior right to divert water through said canal for storage." *Held* not a conveyance nor an agreement to convey any part of the Land Company's decreed priority. *Julesburg Irrigation District v. Harmony Company*, 588.

Ratification. Several irrigation companies associated together for the protection of their rights, appointed a board of directors, and a president, authorizing the latter to have entire charge of the affairs of the association, under the supervision of the directors. The president employed attorneys who conducted litigations over several years, greatly to the advantage to the members of the association. There was no vote of the directors approving the selection of the attorneys but the president reported their employment, at a formal meeting of the board, and no objection was made then or afterward, during the pendency of the litigation. *Held* a ratification binding each member of the association. The result is the same though the association be treated as having no legal existence. *Fort Morgan Co. v. Sterling Company*, 222.

Abandonment. Under contract providing that upon contractor's

neglect or refusal to provide means for energetic and satisfactory compliance with the contract within the time specified in a notice, the United States could suspend the contract and take charge of and complete the work, a written waiver by the contractor of the time given in such notice served upon him, followed by his leaving the work, was a voluntary abandonment of the contract.

Notice to Surety—Completion of Work. Where contractor waived time given him in notice to remedy matter complained of and abandoned the work, his obligee was neither required to wait until the termination of such time to take over the work nor to notify the sureties of his intention so to do. *McPhee v. United States*, 421.

Rescission. One who would rescind a contract for fraud in procuring it must act with reasonable diligence. If for years after the discovery of the fraud he continues to treat as his own, the property the purchase of which was the subject matter of the contract, rescission will be denied. *Lowe v. Howell*, 100.

Defenses. The note being given for stock in the Association, that the stock is not of the value anticipated by defendant is no defense to an action upon the note, no fraud being charged or proven, and no claim being made of any direct damage suffered by defendant, by reason of any act or omission of the Association. *Western Stops Association v. Devine*, 523.

CONVEYANCES.

Construction. A general description of the premises conveyed prevails over a particular description when this is the clear intent.

A conveyance containing a particular description was followed by a clause in these words, "also all real estate of said corporation acquired and which may be acquired in said county, whether particularly described herein, or otherwise". *Held* to pass an interest in the premises mentioned, not contained in the particular description. *Sutton Stock Co. v. McCullough*, 415.

Purpose of not Expressed, may be shown by evidence aliunde. *Baptist Society v. Peoples' Church*, 574.

CORPORATIONS.

Partnership of. Several private corporations having similar interests formed an association for the protection of the rights common to all. By the authority of those to whom they committed the management of their common affairs, attorneys were employed and a litigation carried on for several years, with the knowledge, and to the profit of all. All are liable to the attorneys' bill, even though the association be regarded as without legal existence. *Fort Morgan Co. v. Sterling Co.*, 222.

Election of Directors—Special Meeting. Where the annual meeting of a private corporation for the election of directors is not held upon the day appointed by the by-laws, a special meeting for the election can be called only by the directors, or by two stockholders. (Rev. Stat. sec. 867.) An election at a special meeting called by the president, under authority of the by-laws, is void, unless every stockholder is present and consents to proceed to an election. *Grant v. Elder*, 104.

Different—Identical Officers. An irrigating company which

supplies water from a reservoir to other and different corporations, who are charged with its delivery and distribution to the consumers, is not liable for the defaults of such distributing corporations, even though some of the offices in the two corporations are occupied by the same persons. *Hood v. Burlington Co.*, 318.

Stock—Transfer—Registration. Sec. 870 of the Revised Statutes does not provide for a public record. Creditors of a stock holder are entitled to information as to the shares standing in his name only upon having instituted an action, and becoming entitled to a levy upon the debtor's holdings, under Rev. Stat. 3618, 3619.

The holder of an unregistered transfer has an equitable title, which the corporation is bound to recognize and complete by registration, even after the statutory limit, when the transferee presents himself before any levy attempted under secs. 3618, 3619. *Carlton v. Camfield*, 373.

The stockholders' mere bill of sale of the stock does not pass title thereto as against a subsequent attaching creditor. *Lucifer Co. v. Buster*, 179.

Dissolution—Effect. A judgment rendered against a dissolved corporation, upon a cause of action arising before dissolution, is valid. *Welsh et al. v. Steinbaugh*, 177.

Under Rev. Stat. sec. 899 an action may be maintained against a dissolved corporation, upon a cause of action arising before dissolution, and judgment may go against it, notwithstanding the provisions Rev. Stat. sec. 894.

The expressions of the opinion in Kipp v. Miller, 47 Colo. 598, upon this matter are not *dictum*. *Lucifer Co. v. Buster*, 179.

Trustees at Dissolution—Duty and Liability. The statute authorizing a corporation whose charter has expired by limitation to renew the same within one year (Rev. Stat. secs. 891, 892) does not require the trustees holding office at the date of expiration of the charter to postpone action as trustees, under Rev. Stat. secs. 894. They may proceed at once to convert the corporate property into money, discharge its debts, and distribute the residue among the stockholders. *Welsh v. Steinbaugh*, 177.

Trustees having conveyed all the properties of the deceased corporation to another, receiving only the stock of the latter, were liable at law to a corporate creditor. *Id.*

The creditor was not under duty to proceed in equity against the new corporattion. *Id.*

COUNTY COURT.

Appeal from Justice—Bond. To dismiss an appeal for defects in the appeal bond, without affording appellant opportunity to furnish a proper bond, is error (Rev. Stat. sec. 3853).

This section controls even though the bond is not signed by appellant at all, but only by the surety. *Denver & Rio Grande Company v. Duffey*, 406.

CRIMINAL LAW.

Murder or Manslaughter. If the husband takes the life of his spouse on mere suspicion, or even a just conviction, of prior

acts of adultery on her part, his crime is murder and not manslaughter. *Garcia v. People*, 172.

Forgery—False Statement in Writing Which is Otherwise Genuine, and what it purports to be, e. g., the insertion in a railway time roll of one who, during the time indicated, rendered less service than set down to his credit is not forgery. *DeRose v. The People*, 332.

False Pretenses, made to the prosecutor a considerable time before he parted with his money, which have produced the effect to mislead and deceive, and still remain in his mind, and induce his action, bring the case within the statute, even though, at the time of acting, he is not consciously reflecting upon or remembering such false statements. *Clarke v. People*, 164.

An instruction authorizing a conviction upon "subconscious" remembrance of the former false statement, held, not erroneous. *Id.*

False Pretenses Deceiving the Person to Whom it is Made, is within the statute. It need not be such as would deceive a person of ordinary prudence. *Id.*

Intent to Defraud, need not exist at the time of making the false representation. If in obtaining the prosecutor's money, the accused makes no retraction or qualification of the previous statement, and is intending to have advantage of its probable effect upon the mind of the prosecutor, he is guilty.

Such conduct of the swindler is equivalent to a reiteration of previous false statement. *Id. Clarke v. People*, 164.

Non-Support of Wife. The husband is not liable to prosecution under c. 179 Laws 1911, where the wife has left him without reasonable cause, and without cause, refuses to return to him. *Kilpatrick v. People*, 209.

Keeping Gambling Rooms. The keeper of a pool hall licensed by a city, knowingly permitted several games for money to be played in his hall. *Held* liable to conviction under Rev. Stat. sec. 1790. *Koucles v. People*, 595.

Autrefois acquit. Acquittal of a charge of forgery is no bar to an indictment for perjury, committed by the accused in his trial for the forgery. *People v. Hardy*, 499.

Conviction—General. Under duplicate charge. Conviction of contempt upon two charges, one of which was insufficient in law. There was nothing to show whether the conviction was under both counts, or only one, and if one, which one. Conviction reversed. *Burlington Company v. Spriggs*, 50 Colo. 230, followed. *Murray v. People*, 184.

Evidence—Dying Declarations. The victim of the accused being conscious of impending death, and the wounds manifestly mortal, her dying declaration was held properly received. *Garcia v. People*, 172.

A judgment in a civil action is not admissible in a criminal prosecution against one of the parties thereto, to establish the facts upon which the judgment was based, even though the civil action involves the identical question in issue in the criminal prosecution. *Kirkpatrick v. People*, 209.

An allowance of temporary alimony to the wife in an action brought by her for divorce, is not admissible in evidence against the husband, in a prosecution for non-support. *Id. Kilpatrick v. People*, 209.

Hearsay. Prosecution for the non-support of an illegitimate child of which defendant was alleged to be the father. A pathetic letter addressed by the prosecutrix to her mother, immediately after the discovery of her condition was received in evidence for the People, as well as statements of prosecutrix to third persons. *Held* error, and not rendered harmless by the fact that prosecutrix testified to the truth of the letter and of her statements. *DePriest v. People*, 358.

Error—Record—Effect. The record reciting an arraignment and plea is received in the court of review as importing absolute verity. *Smith v. People*, 290.

Former Jeopardy. Two counts of the information charged the same offense. After the conclusion of the testimony the District Attorney abandoned the first count, and a formal verdict of not guilty was returned thereto, under the direction of the court, and a formal judgment of acquittal entered. *Davidson v. People*, 281.

Writ of Error by The People. The accused being acquitted, the court will not entertain a writ of error on behalf of the people, merely to determine the sufficiency of the evidence to warrant a conviction, where it is improbable that a similar state of facts will again be presented, so that a consideration of the testimony, and any declarations upon it, will neither establish any principle of law or be a guide in subsequent prosecutions. *People v. Kippy*, 597.

DAMAGES.

Personal Injury—Future Suffering. Action for assault and battery. The plaintiff relied solely upon her own testimony, and failed to show with reasonable certainty that she would in the future indure suffering as a result of the assault. An instruction that the jury should consider the probable effect "of the injury upon plaintiff's future health and strength" was held error. *Cookman v. Caldwell*, 206.

Must be Established, by Evidence, that the plaintiff a layman ignorant of the rules of procedure in courts of justice assumed to manage his own cause affords no ground to relieve against the effect of this omission. *Denver & Rio Grande Co. v. Wheatley*, 598. *Exemplary Damages*, denied. *Painesville Bank v. Hammond*, 31. *Expenses of Litigation.* Action for unlawful sale of the goods of plaintiff. Expenses of prosecution of the action are not recoverable. *Painesville Bank v. Hannan*, 501.

DEED.

Execution—Blank as to Grantee, parol authority to fill is sufficient. Such authority may be inferred from the conduct of the party, justifying the inference.

One who delivers to another a conveyance of land, blank as to the grantee, but with authority to fill this blank, is estopped to deny the instrument where the agent has acted in conformity with the authority. *Halliwill v. Weible*, 295.

Delivery. A deed becomes effective only upon delivery. Delivery may be made by an agent, and the agent authorized thereto may insert the name of the grantee. *Halliwill v. Weible,* 295.

DIVORCE AND ALIMONY.

Change of Conditions—Effect as to Alimony. After the allowance of temporary alimony judgment was recovered in another court against both husband and wife, for medical services rendered to the wife in the meantime. The husband made no defense to the action. On the petition of the wife the husband was required to pay the amount of this judgment as well as the wife's hospital bill. *Rotge v. Rotge,* 322.

EQUITY.

Jurisdiction. Equity will not entertain a bill to examine the title of those claiming to be directors of a private corporation, unless there is some paramount equity involved, to which such title is merely incidental. *Grant v. Elder,* 104.

The defendant sold a bill of machinery to one H., the plaintiff becoming surety for H., for a portion of the amount, with the stipulation that when H. had paid a sum equal to that for which plaintiff stood as surety, plaintiff should be discharged. H. having paid a larger sum defendant refused to discharge plaintiff threatening an assignment of the notes to third parties, a judgment by confession, and other troubles. *Held,* that plaintiff was not required to await action of the defendant but might have his bill in equity to compel his discharge, and restrain the proceedings threatened by defendant. *Emerson-Brantingham Co. v. Sylvester,* 276.

Laches. Bill to contest the election of directors of a mining corporation. The election was held in December, 1913. The action was instituted on December 20, 1913. It was not tried until January, 1916,—the delay being attributable to the plaintiffs. Considering the character of the corporate property, involving speculative values, the plaintiff's dilatory conduct was condemned as inexcusable laches. *Grant v. Elder,* 104.

Modifying Decree. A fund being held by a trustee, under appointment of the District Court, a firm of attorneys asserted an attorney's lien upon the shares of sundry of the beneficiaries, for services rendered in establishing their right. The final decree made no mention of the claim of the attorneys. Later on, one asserting a claim to this share of the fund, the cause was opened and a decree entered expressly reserving the right of the attorneys to assert their lien, and upon further litigation the trustee was directed to pay the claim of the attorneys. *Held* that the fund being at all times under the control of the court, and the right of the attorneys to prosecute their claim expressly reserved in the modified decree, the fact that the attorneys' lien was not adjudicated in the original decree was immaterial. *Art Institute v. Denison,* 385.

ESCROW.

Depository Bound by Terms of Deposit. A bank which, having received documents in escrow, delivers them, in violation of the terms of the escrow, is liable.

Conditions, may be defined by a letter transmitting the documents deposited. *Bank of Center v. Cain*, 285.

ESTOPPEL.

Evidence, to establish an estoppel must be clear and convincing. *First National Bank v. Ahrens*, 23.

By Conduct—Plea of, must show that the defendant was misled to his prejudice by the conduct of which he complained. *First National Bank v. Ahrens*, 23.

Where a corporation as the consideration for its endorsement of a promissory note receives an article of personal property, retains and uses it in its business, all question of the authority of the agent making the endorsement is eliminated. The corporation in such case, being estopped to deny its liability on its endorsement, irregularity in the face of the paper is not to be called to the attention of the jury, as notice to the endorsee, as want of authority of the agent making the endorsement. *Western Co. v. First National Bank*, 37.

EVIDENCE.

Judicial Notice, taken that the term of a former appointee to public office has expired.

Not taken of the Journals of the General Assembly. *Capp v. The People*, 58.

Presumptions. One who destroys the improvements upon land in the possession of another must, if he would justify his action, set forth his right by answer. No presumption will be indulged in his favor. *Scott v. Buchanan*, 571.

Witness—Competency. Will Contest. Under Rev. Stat. sec. 7267, brothers of the testator were held properly admitted to deny statements made by the testator touching alleged troubles and controversies with them, the statements having been made in the presence of the proponent of the will, and the principal beneficiary thereunder. *James v. James*, 133.

A defendant who has suffered a default, may, under Rev. Stat. sec. 7284, be called and examined by plaintiff. *Western Co. v. First National Bank*, 37.

Impeachment. The impeachment of a witness by contradiction must be upon matter material to that in issue. Information for the larceny of live stock. The prosecution were permitted to examine the accused as to an admission of a similar crime committed more than a year previous to the date in the information, and to contradict his denial of the admission. Held prejudicial error. *King v. The People*, 398.

Competency. A witness is not to be interrogated as to the ownership of a chattel where his testimony must involve a construction of the facts proved. *Western Co. v. First National Bank*, 37.

Letters—Constituting but a Part of a Correspondence, are not admissible in evidence. *James v. James*, 133.

Admissibility. Declarations of Agent as to His Authority, made by the general manager of a corporation, as part of the trans-

action in question, he having power to make contracts on behalf of the corporation, are admissible. *Western Co. v. First National Bank*, 37.

Admissions—Offer of Settlement. An offer to pay a sum named in settlement of a claim asserted by the one to whom the offer is made is not an acknowledgment of liability. *Chicago &c. Company v. Peppard*, 12.

EXECUTIONS.

Exempt Property—Action for Unlawful Levy. The property owner is not restricted to the proceeding prescribed by Rev. Stat. secs. 3782, 3783, but may have his action for treble damages, under Rev. Stat. sec. 3634. *Collard v. Hohnstein*, 478.

EXECUTORS AND ADMINISTRATORS.

Rights and Authority. The estate of a decedent is not, in any practical sense, in the custody of the law. The executor has no greater right than the testator had in his life time. Pledge of shares in a corporation by testator, not registered within the statutory limit. The objection of the executor to its registration, is without effect. *Carlton v. Camfield*, 373.

EXEMPTIONS.

See EXECUTIONS.

FIRE INSURANCE.

Explosion—Policy Construed. A policy insuring the owner of certain premises against loss by fire contained a condition that the insurer shall not "be liable . . . (unless fire ensues and in that event for damage by fire only) by explosion of any kind." *Held* that where the fire causes the explosion it is to be regarded as a mere incident of the fire, and the insurer is liable for the results thereof. *Western Insurance Company v. Skass*, 342.

FIXTURES.

Moving Fixtures—Not Part of Realty. Machinery, belting, attachments, tools and implements, placed upon mining property by one operating under a lease, with an option to purchase, are trade fixtures, and in the absence of any agreement to the contrary may be removed by the tenant at any time during the term, or within a reasonable time after its termination. *Foote v. Carroll*, 182.

Subject to Attachment. The fixtures placed upon a mine by tenant are subject to attachment at the suit of his creditors. *Id.*

FRAUDS.

Pleading. A general allegation of fraud, e. g., that an acquaintance was obtained "by fraud and misrepresentation", stating no particulars, is not sufficient in law.
So as to fraud and misrepresentation, alleged to have been practiced upon the court, in obtaining a judgment. *Coryell v. Napier*, 466.

Rescission of Contract. See CONTRACTS.

FRAUDULENT CONVEYANCES.

Preferring Creditor. Even by an insolvent, is not iniquitous.

Confession of Judgment, for a debt justly due is not a fraud upon other creditors, even though it affords a preference, and may have the effect to delay other creditors. That the defendant might have delayed the creditor in whose favor the confession is made, and that the confession is to bear interest at less than the legal rate, and the debtor is promised the assistance of creditor in disposing of his property, *held* no evidence of fraud. *Coryell v. Olmstead,* 378.

Chattel Mortgage. Mortgagee of chattels permits the mortgagor to dispose of a considerable part of the mortgaged goods, and appropriate the proceeds to his own use. *Held* a fraud upon other creditors of the mortgagor, invalidating the mortgage and that possession taken by the mortgagee did not affect the result. *Bank of Fort Collins v. Shafer,* 388.

GUARANTY.

Construction. The liability of a guarantor is limited to the words of its contract strictly construed.

By an agreement between plaintiff, two mining companies, and a trustee, it was provided that plaintiff should organize a new mining company that the two mining companies, parties to the agreement, should convey to the new corporation "a satisfactory merchantable title" to certain mining properties and that plaintiff, after the formation of the new company, "and good title to said properties conveyed to it", would provide for the new company a specified sum for the equipment of a mill. In the same connection defendants entered into an agreement with plaintiff reciting that in consideration of the advances to be made by the plaintiff to the new company "during the period required for an examination of the titles, etc. . . . in the event said titles are not found merchantable and good", to repay to plaintiff the moneys by it advanced on account of the new company. *Held* that defendant's agreement was not a guaranty that the title conveyed to the new corporation should be satisfactory to the plaintiff, and that to charge the guarantors, it must appear that the titles in question were, in fact, not merchantable and good. *Sutton, Steele Co. v. McCullough,* 415.

HIGHWAYS.

By Prescription. Action to enjoin a road overseer from opening an alleged public highway. Evidence held insufficient to establish a highway by prescription. *Korf v. Itten,* 3.

Establishment—Burden of Proof. One claiming as a public highway lands in private possession by one claiming title, has the burden of proving the lawful establishment of the highway. *Id.*

Abandonment—Burden of Proof. One arresting abandonment of highway, the establishment of which is admitted or proved, has the burden of showing such abandonment. *Id.*

Grant of Way—Acceptance. The grant made by sec. 4919 U. S. Comp. Stat. 1916, of a way over the public lands for public highways, is accepted by public use and travel, while the lands

still retain their public character; and subsequent purchasers take subject to the easement. *Greiner v. Park County*, 584.

HUSBAND AND WIFE.

Liabilities of Wife. Under Rev. Stat. sec. 3021, the goods of the wife are chargeable with a lien in favor of the keeper of a rooming house, where the two reside. *McDonnell v. Solomon*, 226.

Common Law Marriage—Evidence. Prosecution for non support under Laws of 1911 c. 179. The prosecutrix and accused had cohabited as man and wife for more than six years. At the beginning of this relation the accused was already married to another woman. Four years later this lady secured a divorce. During all their cohabitation the accused invariably addressed the prosecutrix as his wife and introduced her as such to all whom he met; and they were regarded by all their acquaintances as husband and wife. *Held*, a common law marriage. *Smith v. The People*, 290.

Express Agreement not Necessary. An agreement, in words, to be or become husband and wife is not necessary to a common law marriage. The agreement may be inferred from cohabitation and report. *Id. Smith v. The People*, 290.

INDUSTRIAL COMMISSION.

Construction of the Statute. The statute organizing the Industrial Commission (Laws 1915 c. 180) is highly remedial in purpose, and to be liberally construed. *Industrial Commission v. Johnson*, 461. *Industrial Commission v. Aetna Co.*, 480.

Extra Territorial Effect. The law of the place of contract controls the rights and liabilities both of the employer and the employee. Both being citizens of Colorado and residing here, and the contract of employment having been made here, *held* that the death of the employee, occurring in another state, while there upon the affairs of the master, and under his orders, entitled his widow and child to compensation. *Id.*

Findings of—Effect, supported by credible and substantial evidence must be accepted by the courts. But their award not in accordance with their findings, will be rejected. *Industrial Commission v. Johnson*, 461.

Rehearing—Proceedings upon Construed. One claiming compensation for an injury, under the statute, was heard twice by the Commission, and variant orders were made. At a later hearing, entirely new issues were presented. Testimony relating to a new malady, alleged to have recently developed as a result of the accident, was heard. The proceedings were in effect a new trial upon all the issues, and the findings were adverse to the claimant. It was held that the District Court was without jurisdiction to review the action of the Commission, until the claimant had first petitioned for a rehearing, as required by secs. 69, 77, of the act. *Passini v. Industrial Commission*, 349.

Review of by Supreme Court, extends only to the questions of laws (Laws 1915, c. 179, sec. 83). The Court considers only the legal question whether there is evidence to support the finding; not whether the Commission misconstrued its probative effect. *Passini v. The Industrial Commission*, 349.

When is Employee in the Course of His Employment. One employed by a building company as foreman, in charge of the erection of certain buildings at different localities in several of the western states, had completed one of these buildings and had taken passage with a friend in an auto car, to go to another locality, in a different state, where he was to proceed with another building. He came to his death from the accidental overturning of the auto car. *Held* that he was "performing service arising out of and in the course of his employment," within the meaning of the statute. (Laws 1915 c. 179, sec. 8.) *Industrial Commission v. Anderson*, 169 Pac. 135, distinguished. *Industrial Commission v. Aetna Co.*, 480.

Blindness—Compensation. One who has only such vision as enables him to recognize a form before him, but not to distinguish its outline, is blind, within the meaning of the statute. *Industrial Commission v. Johnson*, 461.

INJUNCTION.

To Restrain the Collection of a Tax, is allowed where the tax is levied without authority, and the want of authority is not apparent on the face of the record, e. g., a tax levied upon works for the irrigation of land, used exclusively for watering the land of those entitled to the works. *Shaw v. Bond*, 366.

Should be granted only under unusual conditions, and after notice to all parties in interest. *Grater v. Logan High School District*, 600.

To Restrain Crime. Courts of equity are not equipped for the administration of criminal law, and attempts to extend the jurisdiction to that field, should receive no favor.

Where the direct and immediate effect is to protect property, an injunction may go, even though incidentally it enjoins the perpetration of a crime; otherwise where such result is indirect and inferential only.

Bill to restrain defendants from buying ores known to be stolen. It was contended for plaintiff that enjoining the purchase, would indirectly restrain the theft. The lax administration of the criminal law, and the difficulty proving the theft of the minute quantities often stolen, was also urged.

Considering that if the theft of one class of property may be enjoined, the owners of other properties liable to similar depredations would be entitled to the same relief; that the awarding of the equable relief prayed for must be attended by the same difficulties as the prosecution of the theft, and would in effect be a denial of the right of trial by jury, to one accused of crime, the injunction was denied. *Heber v. Portland Co.*, 352.

INSTRUCTIONS.

Construction. All instructions are to be taken together. What, considered by itself, might mislead. may be corrected by another passage of the charge. *Clarke v. People*, 164.

Construed. An instruction that if any witness had wilfully falsified, any material fact, the jury "should give any other testimony of such witness" weight "according as you deem it

credible, in view of all of the evidence," approved. *Clarke v. People*, 164.

Non-Direction, where no instruction is prayed, is not error. *Clarke v. People*, 164.

Refusal, giving the substance, is not error. Western Co. v. First National Bank, 87.

INTEREST.

When Allowed—Interest. The surety on contractor's bond to the government is liable for interest from the time of breach of contract. *McPhee v. United States*, 421.

Salary of Public Officer. A public *officer* whose salary is withheld from him is not entitled to interest thereon. He is not a creditor within the meaning of the statute, prescribing the rate of interest. *Lindsley v. Denver*, 444.

IRRIGATION.

Reservoir Company—Duty and Liability. Defendant was the owner of an irrigating ditch taking water from the Platte River, and conveying it to Barr Lake Reservoir. It was a mutual ditch. Sundry of its stockholders owned lands at a distance from the reservoir, and organized separate corporations, called respectively The Extension Company and Hudson Company, each of which constructed laterals from the reservoir to the lands of these stockholders. To be entitled to water, the consumer was required to hold stock both in the irrigating company and one of the extension companies. Plaintiff was such stockholder, and sued for the value of crops lost by reason of the alleged negligence of defendant, in failing to supply water, according to its contract. The negligence relied upon was in the conservation and distribution. *Hood v. Burlington Reservoir Co.*, 318.

It was held that when the defendant had delivered to the extension companies, respectively, their due proportion of the water in the reservoir, its duty was at an end. *Id.*

The fact that defendant at times allowed an employee of an extension company to turn water from the reservoir, had not the effect to change the status in this respect. *Id.*

Reservoirs—Canals—Taxation. A ditch conveying water to a reservoir, whence it is distributed solely for the irrigation of the lands of those entitled to the ditch, is not subject to taxation, separate from the land irrigated.

Neither is the reservoir nor the bed thereof. *Shaw v. Bond*, 366.

IRRIGATION DISTRICTS.

Taxes—Interest Coupons. The landowner cannot discharge taxes levied to pay interest upon one issue of bonds, with coupons cut from a different issue. *Poor v. Wilson*, 316.

Warrants—Remedies of Holder. The holder of a warrant of an irrigation district is not entitled to judgment for the amount thereof. His sole remedy is mandamus.

That the warrant is chargeable to "general fund for maintenance" is not important.

The duty of the district board and the county commissioners, under the statute, expounded. *Rio Grande Junction Co. v. Orchard Mesa District*, 334.

Default in Interest—Remedy. Under the provisions of secs. 3456 and 3459 of the Revised Statutes, the sole remedy of the holder of the bonds of an irrigation district, if default be made in tne payment of interest, is by mandamus. An ordinary action demanding judgment for money will not lie. *Rio Grande Junction Co. v. The Orchard Mesa District*, 64 Colo., followed. *Henrylyn District v. Thomas*, 413.

JUDGMENT.

What Is—Record Construed. Action upon a bail bond. Issues found for The People, and "ten days given in which to file a motion for a new trial. The entry of judgment stayed during that time." *Held* not a judgment, and that upon surrender of the principal by the bail, and payment of the costs in the criminal prosecution, as well as in the civil action on the bond the surety was exonerated. *Scott v. People*, 396.

Vacating—Discretion. The granting or denying of a motion to vacate a judgment and allow an answer, under sec. 81 of the Code, is discretionary with the Trial Court. In the absence of an abuse of discretion its action is conclusive upon the Court of Review. *Bunnell v. Holmes*, 345.

Evidence—Burden of Proof. The burden is upon the defendant to show everything which may move the court in his favor, in the exercise of a sound discretion. That defendant had had actual notice of the pendency of the action long before the entry of the default, tends strongly to justify denial of the motion, *Id.*

Knowledge of an attorney employed by defendant is imputed to the defendant himself; and the court is under no duty to relieve him of the consequences of his attorney's mistakes. *Bunnell v. Holmes*, 345.

JURY.

Denial of Peremptory Challenge, to one entitled, is error. *Balfe v. People*, 28.

JUSTICE OF THE PEACE.

Judgment—Presumptions. No presumption is indulged in favor of the judgment of a justice. Jurisdiction must affirmatively appear. *O'Brien v. Miller*, 43.

Docket. Under Rev. Stat. sec. 3892, the docket of a justice must in every case show the amount and nature of the plaintiff's demand. The judgment will not be referred to, to supply the omission of the required statement. *Id.*

Evidence Aliunde, may supply the omission. *Id.*

Burden of Proof, is upon the one claiming under the judgment. *Id. O'Brien v. Miller*, 43.

JUVENILE COURT.

Jurisdiction. The Juvenile Court is a court of record, and, under sec. 4 of c. 179 of the Acts of 1911, has jurisdiction of

an information for the non-support of the wife of the accused. *Smith v. The People*, 290.

LANDLORD AND TENANT.

Abandonment by Tenant, does not terminate the lease, nor the tenant's liability upon his covenants. He cannot accomplish an eviction by his own act. *Shaffer v. George*, 47.

Assignee of Tenant, is liable only for the covenants broken while he is in possession. *Id.*

Assignment of Lease. The landlord's assent to the tenant's assignment of his lease does not relieve the latter of liability for the rent. *Id.*

Nor does the acceptance of rent from the assignee. *Salpaugh v. Hamilton*, 139.

Lan.lord's Failure to Record a Chattel Mortgage, securing the rents, does not impair his right to look to the lessee for rents. *Id. Saulpaugh v. Hamilton*, 139.

Covenants Running with the Land. The covenant to pay the rent, and the covenant to surrender, run with the land, and bind the assignee of the tenant. *Shaffer v. George*, 47.

LANDS.

Rights and Remedies of Landowner. A landowner in possession is not under duty to bring a direct action to vacate a defective proceeding to establish a road over his lands. He may rely upon his possession until his right is assailed. *Korf v. Itten*, 3.

LUNATICS.

Restoration of Reason—Jurisdiction to Discharge. Every proceeding under c. 118 of the Laws of 1915, relating tto lunatics, is open to modificatiton in the court of original jurisdiction, on application of any party in interest, or in his or her behalf, even though no reservation is made in the order or decree.

Petitioner having been declared a lunatic, and recovered her reason as she alleged, applied for the writ of habeas corpus, for her enlargement.

Held that the matter was within the jurisdiction of the court in which the original proceeding was had, and for this reason the writ was denied. *In re Rainbolt*, 581.

MASTER AND SERVANT.

Master's Duty to Inspect Machinery. The rule requiring the master to inspect the machinery used by the servant has no application to simple tools, the condition of which is as evident to the servant as to the master, e. g., an ordinary hammer which the servant provides for his own use. *Wrought Iron Range Co. v. Zeitz*, 87.

Contributory Negligence of Servant. Plaintiff an experienced miner, was, with another miner, ordered by his superior to operate a tram car for conveying ore from the mine of defendant.

The tramway in its lower reaches was upon a considerable declivity, and with many curves, all of which plaintiff knew. He attempted to ride a car without brakes, standing with one foot

upon, "what would be the coupling", at the rear of the car, and holding with his hands. The car having jumped the track at one of the curves he was thrown and injured. There was no rule or direction that plaintiff should ride the car in this manner, or at all, and plaintiff was perfectly informed of the danger of his attempt, and that, uniting with his associate, so that both walking behind the car and holding it, at the steeper part of the grade it would reach its destination in safety, and without injury to those controlling it. *Held* that having himself chosen the dangerous method of performing the work, there could be no recovery. *Dilley v. Primos Company*, 361.

Judgment for defendant upon a directed verdict affirmed.

Order to Servant Construed. An order as to a particular matter construed not to change the established method of work. *Id. Wrought Iron Range Co. v. Zietz*, 87.

MAXIMS.

Expressio—Unius Exclusio Alterius, is in no sense an unalterable rule. *Delta v. Charlesworth*, 216.

MINING CLAIMS.

Application for Patent—Adverse Suit. A stockholder in a corporation entitled to a mining claim to which another applies for a patent, may not interpose an adverse claim and maintain an action in support of it. *Wesseler v. Brinkman*, 29.

MUNICIPAL BONDS.

Presumptions to Support. Where not negatived by the pleadings assailing the bonds of a school district for irregularity, it will be conclusively presumed that the bonds, on their face, recite compliance with all statutory requirements. *Grater v. Logan High School District*, 600.

Recitals—Effect. Innocent purchasers of such bonds, for value, before maturity, are entitled to rely upon the recitals thereof, as against allegations of irregularity in the issue. Under these circumstances the School District, as well as individual tax payers, are estopped to deny the regularity of the issue. *Id.*

MUNICIPAL CORPORATIONS.

Police Power—Exercised by Municipal Corporation. That the state has, in the exercise of the police power, prescribed regulations for those of particular callings, does not prohibit a municipal corporation from prescribing additional regulations for the same class, not in conflict with those of the state, and not in themselves unreasonable or discriminatory. Examples cited. *Provident Loan Society v. Denver.*

Ordinance—Presumptions. An ordinance within the powers granted to the municipality is presumed to be reasonable, unless the contrary appears upon its face. *Delta v. Charlesworth*, 216.

Reasonableness of Ordinance. An ordinance enumerating many places where men usually assemble or pass, provided that no person "shall drink" certain designated intoxicating liquors, while in any of these places "unless the person occupying the building be duly licensed by the city to sell, etc." held that the manifest

purpose of the ordinance is to prevent the drinking of intoxicating liquors in public view, and particularly of children and youth, and thus improve the public morals; that including all of the places of the classes designated, it is therefore authorized by Rev. Stat. sec. 6669. *Id.*

PUBLIC WORK.—*Agreement as to Payment For.* A town having agreed with the contractor for certain public works, after the completion of the works, as to the amount due him, and the time and conditions of payment, is was held a waiver of the provisions of Rev. Stat. sec. 5407. *Ford v. Town of Meeker.*

NEGLIGENCE.

Imputed. A policeman in obedience to a command of his superior officer, takes passage in an auto car, to answer a riot call. He had no voice in the appointment of the chauffeur and no control over him. The negligence of the chauffeur in driving at an intemperate speed is not imputed to the policeman. *Denver Tramway Co. v. Orbach*, 511.

NEGOTIABLE INSTRUMENTS.
See BILLS AND NOTES.

NEW TRIAL.

Attempted Bribery of a Juror, by the defeated party, is no ground for a new trial. *Harvey v. Beard*, 410.

Conclusions of the Court Below, upon any allegation of misconduct on the part of the jurors, or of any other person, with the jurors, are entitled to the same consideratiton as its conclusions upon any other question. *Id.*

NON-SUIT.

Ground of. A non-suit is not to be granted for the omission of plaintiff to establish the converse of an affirmative defense pleaded by defendant. *Ford v. Meeker*, 201.

Motion for—Effect. Defendant's motion for a non-suit admits the truth of the evidence produced on the part of the plaintiff, and every legitimate inference therefrom, interpretated most strongly against defendant. *Id.*

OFFICERS.

Appointment to Office—Legality—Who May Question. One wrongfully holding a public office will not be heard to object that the one contesting his right was appointed for an excessive term. *Capp v. People*, 58.

De Facto—Salary. Payment of the salary of an office to one occupying it without right, but performing its duties, bars the action therefor of the officer *de jure* against the state.

But one who not being entitled to an office performs its duties, under a mistaken claim of right, made in good faith, will not be allowed to recover the salary thereof after another has been judicially ascertained and declared entitled thereto.

The *de jure* officer, ready and willing to discharge the duties of his place, and prevented only by the *de facto* incumbent, may

recover the salary from the *de facto* officer who has received it. *Druch v. Leckenby*, 546.

Ex Officio. Where the statute provides that an officer shall act *ex officio* in another capacity, if the duties of each are of the same general nature, and inseparably blended in the statute creating the independent office, the incumbent holds but one office. If the duties of the two are distinct and governed by different and independent regulations, he holds two distinct and separate official positions.

On the first day of December, A. D., 1902, the City of Denver, and that part of Arapahoe County included within its limits, were by constitutional amendment (art. XX) merged into the City and County of Denver. The inhabitants of the new municipality were authorized to frame a charter by which their affairs should be controlled and as a temporary measure of government it was provided that the charter and ordinances of the City of Denver should, "for the time being only, and as far as applicable", be the charter and ordinances of the City and County; that certain of the city officers' names should continue, occupying similar offices in the city and county, and that the District Attorney should be *ex officio* attorney of the city and county.

The County of Arapahoe was then a Judicial District (Laws 1891, 136), and the plaintiff was the District Attorney therefor, duly elected and qualified. The constitutional amendment provided that the new municipality should constitute a Judicial District.

Plaintiff, upon the adoption of the constitutional amendment, qualified in the office of the Attorney of the City and County of Denver, and performed the duties of that office until December, 1904.

Held that the office of attorney of the City and County of Denver was an office separate and distinct from that of District Attorney, and that plaintiff was entitled to the salary prescribed by the charter and ordinances of the City of Denver, in force at the date of the taking effect of the constitutional amendment. *Lindsley v. Denver*, 444.

PAWN BROKER.

Who Is—Statute Construed. By c. 66 of the Laws of 1897 (Rev. Stat. sec. 4811) the state assumes to regulate the business of pawn brokers, only where those conducting it exact as much as three per cent per month interest. *Provident Loan Society v. Denver*, 400.

Municipal Ordinance. A municipal ordinance may require a license from those lending money at a rate of interest less than that set down in the statute (Rev. Stat. sec. 4811). *Id.*

PAYMENT.

Effect. Two accountants united in practicing their profession. While so associated one rendered service to a patron. Payment to him for the service held a satisfaction of the demand, though in the meantime he had assigned his interest in the joint account to his associate. *Continental Company v. Woodmen*, 271.

Forged Endorsement. A bank may not charge to the depositor an amount paid by it on a forged endorsement of the depositor's check, unless the payment is attributable to some fault of the depositor, or the money has actually reached the person for whom the depositor intended it. *Scala v. Miners' &c. Bank,* 185.

The check was payable to a foreign consul. The forgery was committed by his clerk. The clerk had for some time been authorized to endorse drafts and like instruments, for deposit. This not having been communicated to defendant, was held immaterial. *Id.*

PARENT AND CHILD.

Parent's Duty to Support. Under chapter 179 of the Laws of 1911 the father of an illegitimate child under sixteen years of age may be prosecuted for his failure to support it, without any prior adjudication of the paternity and this whether the child were begotten before or after the enactment of the statute.

No provision of the bastardy act (Rev. Stat. c. XIII) has any bearing upon such prosecution. *Wamsley v. People,* 521.

PARTIES.

Indispensable. Bill to restrain the levy and collection of taxes upon the properties within a certain high school district, to pay the interest on bonds of the district, alleging as ground of the relief prayer, irregularities in the election authorizing the issue of the bonds. The holders of the bonds, being unknown, were not joined. *Held* that the bond holders were indispensable parties, and if service of process upon them cannot be had the bill must be dismissed. *Grater v. Logan High School District,* 600.

Bond—Separate Action—Obligees. Under a government contractor's bond given under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, the United States and persons supplying the contractor with materials may, upon breach of the bond, maintain separate actions against the sureties. *McPhee v. United States,* 421.

PLEADINGS.

What Must be Pleaded. A public statute need not be. *Greiner v. Park County,* 584.

Judgment on the Pleadings—Motion—Presumptions. On motion for judgment on the pleadings the truth of the pleading in question is assumed, and nothing pleaded in contradiction thereof is taken as true. *Shaw v. Bond,* 366.

Admissions. A party is bound by the allegations and admissions of his own pleadings, or of those of another which he adopts. *McPhee v. United States,* 421.

Technical Defects. An allegation in a petition of intervention that principal and sureties executed bonds to United States aggregating $155,000, each surety obligating himself to the extent and in the amount set opposite his name did not affect the substantial right of the sureties, where the petition set out a copy of the bond which showed on its face that the total obligation was $150,000. *McPhee v. United States,* 421.

Demurrer—Several Counts—Effect. Where of several counts

one contains a statement, nowhere disputed in the others, which shows that in no event is the plaintiff entitled to his action, a demurrer to the whole complaint is properly sustained. *Rio Grande Co. v. Orchard Mesa District.*

PLEADING AND EVIDENCE.

Matter not Alleged, will not be considered. Relief cannot go beyond the scope of the allegations. *First National Bank v. Ahrens,* 23.

PLEDGE.

Assignment of Pledge—Rights of Assignee. Collaterals were pledged to secure a promissory note. The note expressly provided that any assignee thereof might take the collateral, "and should be vested with all the powers of the payee." Power was expressly given to the payee to sell the collateral, and himself buy it in. The assignee of the note was, by the assignment, vested with the same power. *Cone v. Carlton,* 1.

Sale—By Agent—Sacrifice of Collateral. Sale of collateral may be made by an agent, acting in the name of his principal. Where the sale is in all respects regular the value of the collateral will not be investigated in an action to recover a balance due on the note. *Cone v. Carlton,* 1.

PRACTICE IN ERROR.

What May be Assigned for Error. Error cannot be assigned upon the refusal of an instruction which is in direct conflict with another requested by plaintiff in error. *Denver Tramway Co. v. Orbach,* 511.

Exceptions—Failure to Reserve to instructions given, to the denial of the motion for new trial, and to the judgment, precludes a review upon the evidence. *Dourte v. Sherey,* 412.

Extent of Review. Action for contribution. The defendant instituted an equitable action to restrain the prosecution. An injunction allowed in this action was afterwards dissolved, and the action dismissed. The defendant in the original action afterwards filed new and additional pleadings therein. Judgment was given for the plaintiff. An exception had been taken to the interlocutory decree in the injunction suit, but no writ of error was sued out to review the final order. *Held* that upon error to the judgment in the original action the proceedings in the defendant's action for an injunction were not reviewable. *Worthington v. Keely,* 91.

Presumptions. Upon a general finding in the court below, conflicts in the testimony are resolved in favor of the defendant in error. *Worthington v. Keely,* 91.

Short Record. The submission of a cause upon an agreed Short Record commended. *Collar v. Gaarn,* 160.

Matter Not Pleaded, will not be noticed. *Painesville Bank v. Hamman,* 301.

Wrong Reason for Right Judgment. Where the court below reached a correct conclusion the judgment will not be reversed, though based on erroneous reasoning.

Findings on Conflicting Evidence, will not be disturbed. *Korf, v. Itten*, 3.

Judgments Not Supported by the Evidence. A judgment resting upon a finding of fact not supported by the evidence will be reversed. *Coryell v. Napier*, 466.

Finding on Sufficient Evidence, will not be disturbed. *First National Bank Ft. Morgan v. Dailey*, 21. *First National Bank Denver v. Ahrens*, 23. *Lee v. Gunby*, 393.

Finding not manifestly against weight of evidence, will not be disturbed. *Rifle Creek Co. v. Brown*, 527.

Harmless Error. The improper admission of a memorandum book containing only this same matter testified of by the keeper of the book, is harmless. *Denver Co. v. Wright*, 300.

Admission or exclusion of cumulative evidence, of a character, not necessarily requiring a finding at variance with the result reached below is harmless. *Lee v. Gunby*, 393.

Party Bound by Position Below. A party who tries his case, throughout, upon one theory, will not be heard to contend upon a different theory in the court of review. *Shaffer v. George*, 47.

Abstract. Questions not presented by the abstract are not considered. *First National Bank of Fort Morgan v. Dailey*, 21.

Instructions Curing Error in Admission of Evidence. An error in the admission of evidence may be cured by an instruction. *Denver Tramway Company v. Orbach*, 511.

Judgment. Pending an action for divorce, the wife incurred a bill for medical services. On her petition the husband was ordered to pay the amount of the wife's liability, being a bill at a hospital, and a bill due a surgeon. It being objected that this required payment to those not parties to the suit, the court declined to reverse the judgment, but directed its modification, requiring payment of the proper amounts into court, to be used by the wife in discharging the indebtedness in question. *Rotge v. Rotge*, 322.

Writ of error pending on application for supersedeas. Error being manifest, the judgment was reversed, and the cause at once remanded, with directions to the court below to correct its irregularities. *Denver & Rio Grande Co. v. Duffey*, 406.

On bill by creditors against an insolvent debtor to vacate a confessed judgment, a receiver of all the properties of the insolvent was appointed, without hearing the creditor in whose favor the judgment was confessed, although he was party to the action. Afterwards the judgment confessed was vacated, and the execution levied thereunder set aside. Upon reversing the residue of the judgment, the order appointing the receiver was not disturbed. *Coryell v. Olmstead*, 378.

PRINCIPAL AND AGENT.

Agent With Limited Authority. Where a transaction is conducted and concluded, or expressly authorized and approved by the principal office of a corporation, the fact that it was instituted by a local agent will not entitle the principal to avail of any

limitations in the authority of the latter. *Emerson-Brantingham Co. v. Sylvester*, 276.

Ratification. If the principal, upon partial acquaintance with the attending facts, and without full inquiry, deliberately ratifies the act of the agent, he will not be heard to question the effect of his action on the ground of want of knowledge.

The testimony examined and held to warrant a finding of ratification. *Western Company v. First National Bank*, 37.

PRINCIPAL AND SURETY.

Government Contract—Bond—Obligees—Priority. Under a government contractor's bond which gives individual creditors and the United States independent causes of action, such as a bond, Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, priorities between individual creditors and such government should be as though between man and man. *McPhee v. United States*, 421.

Several Distinct Contracts of Priorityship for the Performance of a Single Contract—Effect—Alteration. Where the contractor was to furnish bond for $150,000, and with the different sureties executed separate bonds, each reciting that the instrument was a part of the security in the bond of $150,000 required of the contractor, each instrument showing the limit of individual obligations of the sureties on such bond, the fact that the aggregate of such limits was $155,000 did not constitute a material alteration of the bond, for the obligation of the sureties rests upon the primary obligation of the principal. *McPhee v. United States*, 421.

Liability of Surety. Under a bond executed under Act Cong. Aug. 13, 1894, Chap. 280, 28 Stat., 278, in which reference was made to a contract to perform work under the provisions of the "Reclamation Act" (Act June 17, 1902, Chap. 1093, 32 U. S. Stats. at Large, p. 388), the surety is liable for supplies for buildings, dining rooms, furniture and means of provisioning workers, where the work which would take months to complete, was to be performed many miles from any town. *McPhee v. United States*, 421.

Contribution. That one becomes co-surety with another at the latter's request does not relieve him from liability to make contribution. *Worthington v. Keely*, 91.

The right to contribution has its foundation in, and is controlled by principles of equity. It is not founded upon any express contract. One who has paid nothing upon a judgment recovered against him as surety is not entitled to contribution from a co-surety. *Id.*

A bank had agreed to provide funds for a contractor upon certain public works. The contractor purchasing machinery for the work plaintiff, an officer of the bank, the bank being incapable in law to become surety, became surety for the price of the machinery, and defendant, likewise, at plaintiff's request. Judgment was recovered against plaintiff and defendant for the price of the machinery, and the judgment having been satisfied, plaintiff sued for contribution. It appearing that the judgment was paid by the bank, and not by plaintiff, and the plaintiff was under no liability to the bank, *held* the action must fail. *Id.*

Discharge of Surety—Payment. Under a government con-

tractor's bond, where materialmen and laborers and the United States have separate rights and may maintain separate actions on the bond, payment by surety to either one discharges his obligations as to the others to the extent of the payment. *McPhee v. United States*, 421.

Modification—Release of Sureties. Waiver of contractor of time specified in a notice served upon him to comply with certain requirements of the contract did not constitute a modification of the contract so as to release a surety, but was only proof that the contractor refused to proceed further. *McPhee v. United States*, 421.

PROMISSORY NOTES.

See BILLS AND NOTES.

PUBLIC LANDS.

Right of Entryman. One who has made an entry of public lands has a possessory right, good against every one but the United States, extending to all improvements which are in law a parcel of the land, e. g., a building resting upon a foundation of stone embedded in the soil. *Scott v. Buchanan*, 571.

Homestead—Right of Entryman. Rev. Stat. sec. 5834 authorizes the County Commissioners to declare any section or township line in the public domain a public highway. Sec. 2477 of the Revised Statutes of the United States (U. S. Comp. St. 1916, sec. 4919) grants a right of way for the construction of highways over any public land not reserved for public use. One who enters land under the homestead act acquires an inchoate title which has the effect to except such lands from the provisions of the statutes. A highway is not to be established under the statutes cited over land so claimed. *Korf v. Itten*, 3.

Patent—Relation of. A patent for lands relates to the date of the entry whereon it is founded. The patentee has an action for an injury to the property committed between the date of the entry, and the issue of the patent. *Scott v. Buchanan*, 571.

School Section—Reservation of, in the act for the erection of the territorial government did not take effect until a survey of the land under authority of the United States. *Greiner v. Park County*, 584.

Abandonment of Homestead—Effect. The declarations of a highway by the Board of County Commissioners over public lands claimed as a homestead, is without effect, though the entry was subsequently abandoned. The rights of the public in the supposed highway are tested by the conditions existing at the time of the attempted establishment. *Korf v. Itten*, 3.

PUBLIC PRINTING.

Publication of Tax List—Liability. Where certain names and descriptions are suppressed by direction of the treasurer, after the first publication, the publisher of the newspaper is not entitled to the full statutory price, as if the matter were published. *Logan County v. Advocate Company*, 578.

Number of Publications. The statute allows but four publications of the delinquent tax list. The county treasurer's order

for a greater number is without effect to charge the county. *Id.*

Measurement. The printer's compensation is to be computed by rule measurements, rather than by line. Twelve lines of the type of the prescribed size, and width of line, is the basis of the statutory inch. *Id.*

In printing the display headings necessary blank spaces are to be paid for as if solid type. *Id.*

PUBLIC UTILITIES COMMISSION.
See UTILITIES COMMISSION.

QUO WARRANTO.

Statute Construed. The phrase "any franchise" in sec. 320 of the Code includes the powers and rights conferred upon private corporation, and *quo warranto* lies to try the right of those lawfully elected directors of a private corporation and wrongfully prevented from acting. *Grant v. Elder*, 104.

Salary of Office. The right to the official salary is to be determined in other proceedings. *Capp v. People*, 58.

RAILWAY COMPANY.

Fencing Track—Statute Construed. Under chapter 135 of the Acts of 1911 injury by a locomotive to an animal upon the tracks of a railway is prima facie evidence of negligence. *Denver & Rio Grande Company v. Wheatley*, 598.

Under sec. 10 of chapter 135 of the Laws of 1911 the owner of an animal killed upon the tracks of a railway is not required to file a claim with the station agent, until nor unless the railway company has complied with the provisions of secs. 5-9, which are conditions precedent, imposed upon the railway company. *Denver Co. v. Wright*, 310.

And in such case the six months' limitation contained in section 11 does not avail the company.

Presumptions. In an action for the value of live stock killed upon the uninclosed tracks of a railway, at a point where inclosure is required, it will be presumed, nothing appearing to the contrary, that the animals came upon the track at the point where they were killed. *Id.*

REAL ESTATE BROKER.

Right to Commissions. Defendant employed plaintiff to negotiate for him an exchange of houses which he owned, for a stock of goods in another locality. Plaintiff visited and examined the goods, and at his instance the owner of the stock visited and examined the houses. Defendant afterwards himself went to the site of the goods, and made an examination of them, and the exchange was finally consummated, defendant being allowed for the houses the valuation he had originally placed thereon. *Held*, that plaintiff's refusal to attend defendant in his visit to the place where the goods were, was no abandonment of his agency, nor of any duty resting upon him, and that neither this omission, nor expressions to third persons of indifference as to the result of the negotiation, manifesting impatience at the defendant's

delays, in any manner deprive plaintiff of his commissions. *Zeigler v. Butler*, 274.

RECALL FROM OFFICE.

Protest—Duty of Secretary of State. The Secretary of State is not under duty to immediately file in his office, a paper presented to him as a petition for an election to recall an officer. *Landrum v. Ramer*, 82.

It is his duty to examine what is presented, and determine whether it complies with the requirements of the constitutional amendment (Laws of 1913, 673 sec. 2), and he is entitled to a reasonable time for such examination. *Id.*

Petition—When Filed. A petition for the recall of an officer was presented to the Secretary of State, and was indorsed by him "Received for Consideration November 2, 1915," and was finally filed by him on the 12th. A protest was filed on the 27th of the same month. It was shown that at the presentation of the petition, it was agreed between the Secretary and those in charge of the petition, that the paper should not be filed until the Secretary had carefully examined it. The delay in the examination was sufficiently excused. *Held* that the petition was in fact filed on the 12th, and not on the 2d of November, and the protest was in time. *Landrum v. Ramer*, 82.

RECEIVER.

Rights of. A receiver has no greater right than the person or corporationover whose estate he is appointed. *Coryell v. Napier*, 466.

ROOMING HOUSE.

Lien of Keeper. Section 4013 of the Revised Statutes applies to hotels, boarding houses, rooming houses, and the like. *McDonnell v. Solomon*, 226.

The evidence examined and held to warrant a judgment establishing the lien of a keeper of a rooming house upon the goods of the tenant.

Under Rev. Stat. sec. 3021 the goods of the wife are chargeable with the lien equally with those of the husband. *Id.*

SALE.

Implied Warranty—Contract Construed. Defendant agreed to sell to plaintiff a quantity of cement of two kinds, to be used in the construction of an irrigation dam. One of these was designated as Portland cement and the other as Alkali Proof. The contract of sale guaranteed that the Portland cement should meet certain standard specifications, but provided that the seller "will not be responsible for the improper use of cement." The amount of cement to be furnished was specified. *Held*, that notwithstanding the provision quoted, there was an implied warranty on the part of the seller that the cement should be fit for the purpose for which it was purchased. *Thomson v. Colorado Cement Co.*, 156.

That whether the dam was to be entirely of cement or only the core, was immaterial. *Id.*

That it was only against the improper use of cement that the seller refused to guarantee. *Id.*

The rule that an express warranty precludes an implied warranty has no application where the express warranty is of one article and an implied warranty is asserted as to another. *Id.*

SEALS.

Abolished. A writing under seal is no more than a simple contract (Rev. Stat. sec. 682). *Hallowell v. Weible*, 295.

STATE LANDS.

Lease of State Lands—Assignment—Approval of State Board. Semble that the approval of the State Land Board is a condition precedent to the right to assign a lease of state lands. *Bank of Center v. Cain*, 285.

STATUTES.

Public Need not be Pleaded. Bill to restrain the county from occupying certain lands as a public road. The answer claimed the premises "as such public highway . . . by full right and authority of law," *Held* that defendant was entitled to avail itself of the act of Congress of July 26, 1866, without pleading it. *Greiner v. Park County*, 584.

Waiver of. Sec. 5407 of the Revised Statutes provides that before any payment shall be made to a contractor for public works the contractor shall present to the trustees of the town a statement in writing showing the amounts owing by him for labor, etc. The town having, after the completion of the works entered into a contract with the contractor as to the balance due him, and the time and conditions of payment, an action was brought by the contractor, under this contract. *Held* the contract waived the provisions of the statute. *Ford v. Meeker*, 201.

When Exclusive. To have this effect the statute must expressly or by necessary implication, abrogate the right to an action given by the common law, or a former statute. *Collard v. Hohnstein*, 478.

Construction. Legislative Journals will not be considered in the construction of a statute unless pleaded and proved. *Capp v. People*, 58.

Clerical Errors. The courts have power to correct manifest errors in a statute in order to give the enactment its evident meaning. *Id.*

Inasmuch as the proviso to sec. 26 of c. 51 of the Laws of 1915, read literally, is without meaning, the section numbered "2" in the statute is to be read "11." *Id.*

Statutory provisions exempting from taxation properties used for charitable purposes are liberally construed. *Horton v. Colorado Springs Masonic Society.*

Construed. A statute conferred upon towns and cities power "to license, regulate or prohibit, the sale or giving away of intoxicating liquors." Held not to exclude the adoption of an ordinance prohibiting the drinking of all such liquors in public places. *Delta v. Charlesworth*, 216.

Title. See CONSTITUTIONAL LAW.

SUPREME COURT.

Jurisdiction. The Court will not entertain an original proceeding which involves a hearing of testimony, and determination of facts, where an inferior court has ample jurisdiction. *In re Rambolt*, 581.

TAXATION.

What Taxable. It is the right of succession and not the property left by the decedent, which is the subject of the inheritance tax. *Walker v. People*, 143.

Bonds payable to bearer, the property of a resident of another state, and there situate, are subject upon his demise to the laws of such other state. Neither such property, nor the right of succession thereto, have any status in this state.

The fact that bonds are secured by a mortgage of lands within this state does not affect the question. *Id.*

Bonds to bearer, payable in another state, owned by a resident thereof, and in his possession there, are not subject to inheritance tax in Colorado. *Walker v. The People*, 143.

Exemption—Charitable Societies. A building owned by a corporation organized by several Masonic Societies who own all the stock except the qualifying shares issued to its directors, and which derive all their income from annual dues, fees for initiation, and charitable donations, and devote it entirely to the relief of the needy, is exempt from taxation, though a stand is maintained therein, for the sale to those privileged to be there, of cigars, tobacco, and other like wares, as well as a reading room for the use of members of the different Masonic bodies and though dances and dinners are given in a room devoted to this purpose, where non-members are admitted, and an admission fee is charged. *Horton v. Colorado Springs Masonic Society*, 529.

Tax Sale—List—Publication Of. See PUBLIC PRINTING.

TAX TITLES.

Tax—Deed—Effect. In an action for the recovery of lands in an irrigation district, under a tax deed, judgment may, under sec. 22 c. 109 of the Laws of 1915 be given, that defendant within a time limited pay into court the tax and interest evidenced by the deed, and the cost of its execution and record, and that in default of such payment plaintiff is declared the owner of the land, and entitled to possession;—and this, even though the deed is void upon its face. *Dussart v. Abdo. Co.*, 57 Colo. 423, and *Silford v. Stratton*, 54 Colo. 248, distinguished. *Delta Co. v. Uaninetti*, 265.

Regularity of Tax Deed, is subject of legislative control. The final provision of sec. 22 of c. 109 of the Acts of 1915, is not unconstitutional. *Id.*

TOWNS.

Liability to Attorney. An attorney employed by the trustees of a town to defend an action against the municipality and the board of trustees, is entitled to recover of the town his reasonable fee in the premises. *Oak Creek v. Wiley*, 30.

An ordinance prescribed a monthly salary for the attorney, "for routine business and counsel," and provided that for spe-

cial service "he shall receive such compensation as may be agreed upon." A resolution directed him to defend a specified action against the town and the trustees thereof. He was entitled to recover the reasonable value of the services rendered, though there had been no agreement as to the same. *Oak Creek v. Bomier*, 31.

TOWNSITES.

Probate Judge as Trustee. Under the act for the relief of the citizens of Denver (5 Stats. at L. 657) the Probate Judge was trustee for those actually occupying lots in the townsite at the date of the entry, and as to them only to the extent of such occupancy. *Eisenhart v. Denver*, 141.

The finding of the trial court being sustained by competent testimony the judgment of the Court of Appeals (27 Colo. App. 470) was affirmed. *Id.*

TRIALS.

Questions for Court and Jury. It is the province of the court to construe a contract, and to submit the interpretation of a writing to the jury is error. *Trimble v. Collins*, 464.

The jury determine whether compliance with a contract is shown; and where an agreement is to be performed in reasonable time, e. g., as where no time of performance is specified, the question whether it was so performed is for the jury. *Id.*

Whether a mere passenger riding with one who drives at a furious speed is negligent in not protesting at the furious course of the chauffeur is for the jury. *Denver Co. v. Orbuch*, 511.

Issues—Findings. A finding by the court upon an issue it would not permit to be made, is error. *McPhee v. United States*, 423.

UTILITIES COMMISSION.

Powers. The Commission has no power to prescribe a charge for a service not to be rendered. It has nothing to do with commercial problems and policies. *Consumers' League v. Colorado & Southern Railway Co.*, 502.

Considerations Controlling Its Decisions. The Commission is without authority in fixing railway rates, to take into account rates of which no evidence was offered. *Denver Co. v. Chicago Co.*, 229.

Though the law imposes upon the Commission the duty to keep itself advised of the condition of the railway service, they are not to take this knowledge into account in deciding controversies as to divisions of the through rate, between the carriers participating in the service. *Id.*

Where the Commission reduces the rates for the carriage of a commodity over different lines, inequalities in former divisions are not to be perpetuated. *Id.*

That one of the several roads participating in the carriage, has, acting under compulsion, accepted an unreasonable share of the previous through rate does not warrant the continuation of this unreasonable division. *Id.*

The strategic position of a railway may in the matter of the

division of a through rate, be considered, but it is not the controlling factor. *Id.*

A railway which carries a coal for which there is an increasing demand, should not be discriminated against because this article is produced upon its lines. It is of public interest that such coal should move freely to the regions where it is demanded. *Id.*

Where several companies participate in the carriage of a commodity produced upon one of them, the whole line of which is within the state, the number of cars furnished by the other companies is not to be considered in fixing the division of the through rate, where there is no testimony as to the number of cars furnished for the traffic within the state, or the number furnished for the carriage to points beyond the state. *Id.*

A reasonable division of a joint rate is not to be denied to one of those engaged in the service because of derelictions, past, present, or anticipated. *Id.*

A company having no terminal facilities at the point where it delivers freight to either companies participating in the through carriage must pay the customary reasonable charge made for switching by other companies. *Id.*

If an excessive charge is made for this service the company aggrieved is not to retire from the service, but to apply to the Commission for relief. *Id.*

Review of Orders. Under sec. 52 of c. 127 of the laws of 1913 the review in this Court of the orders of the Public Utilities Commission is controlled by the considerations applying in other cases, except as otherwise provided by the act. *Id.*

This court must determine whether the order of the Commission in question is just and reasonable, and supported by competent evidence heard by that body. This duty the court cannot escape. *Id.*

The court is not, however, to overrule the order of the Commission where there is a substantial conflict in the testimony. The deductions of witnesses from the testimony, are not, in themselves testimony, and conflicts in such deductions are not considered. *Id.*

Power of the Court. The court is without authority to prescribe in detail the rate, or division of the rate, to be charged by the several companies participating in the service. Sec. 52 of the statute simply authorizes it to affirm, vacate, or modify the order of the commission. *Id.*

Judicial Notice, will not be taken of the records of the Utilities Commission. *Id.*

Order Reversed. Appeal from the order of the Public Utilities Commission controlled by the opinion in No. 8939, *ante*, so far as the questions presented are identical or similar. *Chicago Co. v. Utilities Commission,* 263.

An order of the Commission allowing to one company a greater rate, for the shorter haul, than that awarded to another, for the longer haul,—over the same road—vacated as not supported by the testimony, and contrary to all reason. *Id.*

Railway—Switching Charges. A rule eliminating all distinctions between shipments over the line of the carrier, and

switching charges, prescribing a uniform rate for all cases, regardless of whether switching is performed or not, condemned. *Consumers' League v. Railway Co.*, 502.

WATER RIGHTS.

Adjudication Decree—Effect. A decree adjudicating the priorities of the several ditches of a certain stream, and the volume to which each was entitled, *held* to control and overrule an express agreement of the parties to a contrary distribution, though reported and approved by the referee, and though the court approved and confirmed these findings in all respects: *held* that the officers in charge of the water service were bound by the decree. *Forker v. Hopkins*, 325.

Doubted if the evidence and referee's findings were admissible to vary or avoid the effect of the decree,—even as against third persons, having full notice. *Id.*

WILLS.

Contest—Undue Influence—Evidence. Only general rules can be prescribed as to the character and amount of evidence to establish undue influence. The evidence need not, nor can be, of the direct and positive character required to establish a physical fact. Circumstances from which undue influence may reasonably inferred suffice. *Davis v. Davis*, 62.

Every favorable inference, fairly deducible from the facts shown, must be considered as facts proved in favor of the contestant. *Id.*

If several inferences may reasonably be made, the one most favorable to the contest must be accepted. *Id.*

That the distribution of the testator's estate is contrary to natural justice, may, with other facts, be considered; but that the will is not such as the jury or the court would have made, is not sufficient to deny it probate. *Id.*

It is not for the jury to determine whether the will is a just and proper distribution of the testator's estate. *Id.*

The evidence examined and held to warrant the verdict of the jury in favor of the contestant. *Id.*

Probate—Questions for the Jury. The effect of intemperance in the use of intoxicating liquors is for the jury. *Id.*

Verdict—Effect. The verdict of a jury is of special importance, and should not be disregarded except for grave reasons clearly apparent. *Id.*

Trial Judge—Approval of Verdict. That the trial judge has refused to disturb the verdict is entitled to consideration upon error brought. *Id.*

Attesting Witness, may testify in favor of those contesting the probate of the will. The credit to be awarded to his testimony is for the jury. *Id.*

Habitual Intemperance. Instruction as to the effect of, and the duty of the jury in considering the evidence, approved. *Id.*

Legacy—Specific or Demonstrative. If compatible with the language employed, a legacy will be declared general or demonstrative, rather than specific. *Collar v. Gaarn*, 160.

Construction. Every will is to be construed as a whole, and effect given to each of its provisions if possible. *Collar v. Gaarn,* 160.

Contest—Incapacity—Undue Influence. Testimony held sufficient to warrant the findings that the testator was mentally incapable, and acted under undue influence of the devisee. *James v. James,* 133.

Construed. Bequest of a note of $1,000, loaned to the I. O. O. F., to be delivered to the legatee "as soon as possible after my decease, or if that cannot be done she shall receive the interest until the principal is paid to her." The legatee was directed to turn over $100.00 towards "my funeral expenses", and requested to bequeath "the remainder of the proceeds of the note" after her death, to members of the family named. Prior to the death of the testator the note had been paid in part, and for the residue certain bonds of the Odd Fellows' Association had been accepted, and were a part of the estate. *Held the legatee was entitled to* the bonds. *Collar v. Gaarn,* 160.